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Supreme Court of the United States

OCTOBER TERM, 1985

NORMA RANDOLPH,

Petitioner,

vs.

SUPREME COURT OF NEW JERSEY and
WILLIAM M. LANZARO, Monmouth County Sheriff,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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The petitioner, Norma Randolph, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered on January 7, 1986, in Matter of Randolph, 101 N.J. 425, 502 A.2d 533.

QUESTION PRESENTED

Does a New Jersey court rule, which has been applied to prohibit a court aide from engaging in activities of local government agencies and community organizations including the NAACP, unconstitutionally abridge the aide's First Amendment rights?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	v
JURISDICTION	v
CONSTITUTIONAL PROVISIONS INVOLVED	v
STATUTE OR RULE INVOLVED	vi
STATEMENT OF THE CASE	1
REASON FOR GRANTING THE WRIT	10
THE DECISION OF THE NEW JERSEY SUPREME COURT CONFLICTS WITH FUNDAMENTAL PRINCIPLES ARTICULATED BY THIS COURT IN THE FIRST AMENDMENT AREA.	
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3d Cir.), cert. denied, 419 U.S. 844 (1974)	12
Connick v. Myers, 461 U.S. 138 (1983)	10,11
CSC v. Letter Carriers, 412 U.S. 548 (1973)	11
Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967)	17
N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958)	10,14
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	17
Pickering v. Board of Education, 391 U.S. 563 (1968)	11,13,14
Shelton v. Tucker, 364 U.S. 479 (1960)	17
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	11

OPINION BELOW

The opinion of the Supreme Court of New Jersey is reported at 101 N.J. 425 and 502 A.2d 533. A copy of that opinion appears in the Appendix hereto. No other o inions were delivered below.

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of New Jersey on January 7, 1986, and this petition is filed within 90 days of that date. The jurisdiction of this Court is conferred by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

STATUTE OR RULE INVOLVED

New Jersey Court Rule 1:17-1:

The following persons in or serving the judicial branch of government shall not hold any elective public office nor be a candidate therefor, nor engage in political activity, nor, without prior written approval of the Supreme Court, requested through the Administrative Director of the

Courts, hold any other public office, position or employment:

(a) Judges;

(b) The Administrative Director of the Courts, the Clerk of the Supreme Court, the Clerk of the Superior Court, the Clerk of the Tax Court, and all employees of their respective offices, and official court reporters;

(c) Probation officers and all employees of county probation departments;

(d) Jury commissioners, clerks to jury commissioners and all persons employed by or regularly assigned to offices of jury commissioners;

(e) Clerks to grand juries, assistants to clerks of grand juries, and all employees regularly assigned to attend or serve grand or petit juries;

(f) Law secretaries, stenographers, sergeants-at-arms, court criers, assignment clerks, courtroom clerks, court

attendants and all public employees regularly assigned to a judge or court;

(g) Surrogates, except such political activity as is directly related to seeking reelection. The following shall apply only to surrogates who, prior to June 1, 1983, have filed (in a primary or otherwise) for election to another office or, prior to said date, have been elected to another office: (1) such surrogate may engage in political activity related to seeking such other office or serving in same; (2) such surrogate may not, while serving as surrogate, seek reelection to said other office nor, while serving in said other office, seek reelection as surrogate;

(h) Deputy surrogates and all persons employed or regularly assigned to a surrogate's office;

(i) Clerks, deputy clerks, violations clerks and all persons employed

by or regularly assigned to a municipal court.

STATEMENT OF THE CASE

Petitioner Norma Randolph is a court aide appointed by a county sheriff. Supervised by a court attendant, who is also an appointee of the sheriff, Mrs. Randolph swears in witnesses, escorts juries, prepares the courtroom with water pitchers and chairs, and occasionally announces the entrances and exits of the judge. She does not attend the judge, however; and she does not answer the telephone, procure law books or documents, deal with attorneys, or otherwise participate in the adjudicative process. Her salary is $7,000 per year. Pet. App. A-106 to A-109.

The power of the Supreme Court of New Jersey has been wielded to compel Norma Randolph to choose between her job and service to her community. She may not swear witnesses and escort juries while helping young people through participation in a

municipal Youth Guidance Council. She may not fill water pitchers and announce the entrance of a judge while serving on the executive committee of a local NAACP chapter. Her constitutional speech and associational rights must bend to remote and speculative fears that the independence of New Jersey's judiciary may somehow be compromised.

Mrs. Randolph is a woman who has devoted her life to civic and community service. She has been active for many years in the local NAACP chapter and is currently a member of its executive committee. She also serves as second vice-president of a local homeowners organization. Additionally, in recognition of her service to the community, Mrs. Randolph has been appointed to several municipal and county boards and committees. As the New Jersey Supreme Court majority acknowledged, "she

is indeed an exemplary citizen whose desire to continue to serve her community on its public boards and through community organizations fulfills for her a deep commitment to help others." Pet. App. A-8.

In January 1983, Mrs. Randolph was hired by the Sheriff of Monmouth County as a court aide.[1] Shortly thereafter, she submitted a list of her outside activities to the Monmouth County trial court administrator. By letter dated March 31, 1983, from the Administrative Office of the Courts, Mrs. Randolph was advised that she could not continue to serve on the Monmouth County Mental Health Board, the Freehold Borough Municipal Youth Guidance Council, the Freehold Borough Citizens Participation

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[1]The majority incorrectly referred to petitioner as a court attendant. In fact, as the dissent pointed out, Mrs. Randolph is a "court aide", a position which is subordinate to court attendant, and thus even further removed from judicial authority. Pet. App. A-106 to A-109.

Committee for HUD, or the Freehold Borough Board of Assessment, "primarily because they are committees of other branches of government, and also they involve a significant likelihood of involvement in political activity." Pet. App. A-3 to A-5. The letter further advised that Mrs. Randolph could not continue to hold an office in the NAACP or the United Progressive Homeowners and Taxpayers Association, Inc. "because these activities also hold a substantial potential for political activity." Id.

These restrictions were based upon New Jersey Court Rule 1:17-1, which prohibits judges and court employees from engaging in "political activity". The rule itself does not define "political activity", and there were no precedents to provide guidance.

On May 6, 1983, the Assignment Judge of Monmouth County ordered compliance

with the restrictions, requiring the Sheriff of Monmouth County to reassign Mrs. Randolph should she continue to be engaged in these outside activities. Pet. App. A-5. On May 30, 1983, a notice of petition for review on behalf of the Sheriff of Monmouth County was filed with the State Supreme Court. Pet. App. A-5 to A-6. In the petition, the Sheriff raised certain of the federal constitutional issues sought to be reviewed here. The State Supreme Court granted the petition and ordered a factual hearing as to the organizational activities of Mrs. Randolph. Pet. App. A-6. The order also directed the Attorney General to appear on behalf of the Judiciary.

A hearing was held on October 21, 1983 before a judge of the Superior Court of Monmouth County who thereafter submitted recommended findings of fact in accordance with the Supreme Court's order. Pet. App.

A-6. Briefs were then filed with the State Supreme Court on behalf of Mrs. Randolph, the Sheriff of Monmouth County, the Judiciary and, as amicus curiae, the NAACP. The briefs addressed the definition and scope of the rule, as well as the federal constitutional issues sought to be reviewed here. The State Supreme Court heard argument on September 10, 1984.

On January 7, 1986, the State Supreme Court rendered its decision. A majority of four justices, in a per curiam opinion, voted to uphold the rule in its broadest form and fully applied it to Mrs. Randolph. Two justices dissented "[a]s a matter of both constitutional law and public policy." Pet. App. A-85. The remaining justice concurred in part, but dissented insofar as the decision restricted Mrs. Randolph's activities in the pri-

vate organizations, the NAACP and United Homeowners. Pet. App. A-78.

Both the majority and the dissent agree (Pet. App. A-8 to A-16, A-90 to A-92) that they were required to apply the balancing test established by this Court in Pickering v. Board of Education, 391 U.S. 563 (1968). However, they differed sharply as to the manner in which that test should be applied--particularly with respect to the governmental interest involved. The majority declared that "issue activity is political activity", Pet. App. A-26, and thus concluded that any such activity by a court employee compromises the integrity of the judiciary. The majority offered no evidence that a court aide's outside activities would have such an effect. Instead, it rested upon "a tone, a feeling, an atmosphere, of impartiality that should

surround everything that has to do with the judiciary." Pet. App. A-66.

The dissent countered that "there is no valid justification for an absolute prohibition upon the civic and community activities of court employees, particularly those who are as far removed from the judicial decision-making process as is Mrs. Randolph." Pet. App. A-106. It stated that "under a literal application of the majority's test, a judicial employee, regardless of his or her position, could not serve as an officer in a religious organization, a parents'-teachers' association, or neighborhood environmental group."[2] Pet. App. A-97. The dissent added that "[a]ny restrictions must be based upon realistic appraisals of substan-

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[2]This prophesy came true a month later when the State Supreme Court applied its test to prohibit another employee from having an active role in a local environmental group.

tial harm to the government", Pet. App. A-112, and that "the Court could resort to other less restrictive measures" to effectuate its goal. Pet. App. A-120. The dissent concluded:

> "Certainly, a mere allegation that an organization committed to benefitting the community may have a potential for public controversy is not a sufficient basis on which to curtail Mrs. Randolph's First Amendment rights. Under the Pickering balancing test, the judiciary's interest in Mrs. Randolph's right to engage in activities that do not constitute traditional electoral political activity is minimal. In contrast, Mrs. Randolph's rights are fundamental and compel this Court's vigilant protection."

Pet. App. A-122 to A-123 (emphasis in the original).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE NEW JERSEY SUPREME COURT CONFLICTS WITH FUNDAMENTAL PRINCIPLES ARTICULATED BY THIS COURT IN THE FIRST AMENDMENT AREA.

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958). It is equally beyond debate that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expresssion." Connick v. Myers, 461 U.S. 138, 142 (1983).

Nevertheless, public employees are subject to some constraints and courts are obliged to seek "a balance between the interests of the [employee], as a citizen,

in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568 (1968), quoted with approval in Connick v. Myers, supra, 461 U.S. at 142.

Thus, public employees may be barred from partisan political activities. United Public Workers v. Mitchell, 330 U.S. 75 (1947). But neither Mitchell, nor CSC v. Letter Carriers, 413 U.S. 548 (1973) which reaffirmed Mitchell, permitted an abridgement of the First Amendment rights of public employees beyond the area of partisan politics. As this Court held in Mitchell:

> "It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, per-

> sonalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success." 330 U.S. at 100.

To the same effect is Letter Carriers which catalogues half a dozen activities that may be barred to public employees, every activity being of a partisan political character. 413 U.S. at 556. And cf. Alderman v. Philadelphia Housing Authority, 496 F.2d 164, 172 (3d Cir.), cert. den., 419 U.S. 844 (1974) (Letter Carriers construed "to inhibit only 'partisan political activity' and not all political 'discussion'"; emphasis by the court).

No precedent of this Court expands the incursion into public employees' First Amendment rights beyond the area of partisan political activity. No precedent sanctions the New Jersey Supreme Court's simple but devastating concept that "issue

activity is political activity". Pet. App. A-26. Indeed, Pickering itself held that "[t]he public interest in having free and unhindered debate on matters of public importance--the core value of the Free Speech Clause of the First Amendment" is so vital that it overrides a schoolteacher's duty of loyalty to his superiors "absent proof of false statements knowingly or recklessly made by him...." Pickering v. Board of Education, supra, 391 U.S. at 573-575.

The New Jersey Supreme Court has not only abridged petitioner's First Amendment rights far beyond what this Court has allowed. It has additionally distorted the other half of the Pickering balancing equation. Citing "a tone, a feeling, an atmosphere," Pet. App. A-66, it has speculatively taken the role of a court aide who performs minor ministerial functions and

exaggerated it into a theoretical detriment to judicial impartiality.

Objectively, there is no evidence at all that the efficiency of petitioner's public services--or the independence of the New Jersey judiciary--will be promoted by eviscerating this court aide's right as a citizen "in commenting upon matters of public concern," Pickering v. Board of Education, supra, 391 U.S. at 568,[3] as well as her "freedom to engage in association for the advancement of beliefs and ideas," N.A.A.C.P. v. Alabama, supra, 357 U.S. at 460.

In this connection, the dissent persuasively cites Canons 5B and 7B of the Code of Conduct for United States Clerks as

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[3]The New Jersey Supreme Court majority stated: "If there is a role as officer in the private organizations [e.g., the NAACP] that petitioner can fulfill, not as advocate, leader, or spokesperson in the public forum, we will sympathetically evaluate the request." Pet. App. A-70; emphasis added.

illustrative of adequate, yet far less intrusive measures for protecting judicial independence. Pet. App. A-118 to A-120. United States Clerks, who (unlike petitioner) are closely tied to the adjudicative process (e.g., they are involved in assigning cases to particular United States District Judges), "may serve as an officer, director, trustee or advisor of a civic or charitable organization" (subject to fund-raising limitations) and "may engage in nonpartisan political activity that does not tend to reflect adversely on the dignity of the court or his office, or interfere with the proper performance of his official duties." Id.

The majority opinion's response to this federal example of less restrictive means to the end of judicial independence begins with the notion that the federal judiciary has a stronger tradition of inde-

pendence than New Jersey did prior to its transition to the present system. Pet. App. A-60. But the transition, which took place in 1948, did not give rise to the court rule at issue here. In fact, the source rule only dates back to 1961 and it only barred partisan political activity at that time. Pet. App. A-101. In 1969, when the rule was amended to prohibit all political activity, more than two decades had passed since the transition. Id. And almost two decades more have passed to reach the current concept that "issue activity is political activity." Pet. App. A-26. The majority's historical excursion is an unsupported makeweight.

The other response by the majority is that the federal example is inapposite because "federal district courts and officers are often distant from the arena of controversy." Pet. App. A-60 to A-61.

This response is so obviously contrary to reality as to require no further comment.

Of course, there is nothing inherently invidious about variation between federal and state court employee rules. But where, as here, First Amendment rights are at issue, even legitimate and substantial governmental purposes may not be pursued "when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963), quoted with approval in Keyishian v. Board of Regents of New York, 385 U.S. 589, 604 (1967).[4]

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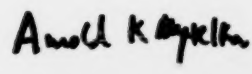
[4]Should centiorari be allowed, we ask leave to advance the additional contention that the rule in question here is unconstitutionally vague.

CONCLUSION

Petitioner urges the Court to grant centiorari to correct the New Jersey Supreme Court's substantial departure from settled First Amendment principles as articulated by this Court.

Respectfully submitted,



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Dated: April 3, 1986

IN THE MATTER OF NORMA RANDOLPH
Argued September 10, 1984 - Decided
January 7, 1986

PER CURIAM

This case raises questions concerning the proper balance of a public employee's First Amendment rights of freedom of expression and association with the performance of the public's business. It is necessary to state at the outset what this case is not about, and what it is about. The case is not about a neighborhood housewife serving on a PTA who wishes to work in the court system. The case is primarily about a holder of three appointed political offices who wants to remain active in other branches of government while serving as a courtroom officer. One of the great reforms of the judicial article of the 1947 New Jersey Constitution was the complete separation of poli-

tics from the judiciary. We do not believe that constitutional principles of free speech and association require our sanction of a politicized judicial system. We deny the court officer's request to continue to serve in the political offices while employed as a court officer. We also deny the court officer's request to continue to serve in an advocacy role as an officer in two private organizations involved in issues that inevitably spill over into the public area.

I.

This case involves a judicial employee's challenge to court restrictions upon her right to serve on other governmental boards and bodies and as an officer of nonprofit associations that influence governmental policymaking. We hold that when such activities pose a realistic

likelihood of (1) involving the judicial employee in important and recurring public issues that are frequently the subject of political controversy; (2) giving the impression of judicial involvement in those issues; and (3) creating the appearance of a judiciary lacking in impartiality either in general or on such social or political issues, these activities interfere with the paramount responsibility of the judiciary to maintain the independence of its members and employees in both fact and appearance. We find that the activities considered in this record realistically pose the likelihood of such a disruptive effect upon the work of the judiciary. Accordingly, we deny the employee's request to continue the activities while serving as an officer of the court.

The petitioner, Norma Randolph, was hired by the Sheriff of Monmouth

County as a court attendant in January 1983. She is a uniformed employee who attends the judges of one or more of the courts located in the Monmouth County Court House in Freehold, New Jersey. Her duties include supervision of the activities of parties, jurors, and witnesses in the courtroom; the work of court crier; swearing in witnesses; sequestering jurors; and in general the performance of nonsecurity tasks related to the conduct of courtroom business. Shortly after the commencement of her employment, petitioner submitted a list of her outside activities to the Monmouth County trial court administrator. After review, the Administrative Office of the Courts advised petitioner that she could not continue to serve, as requested, on the Monmouth County Mental Health Board, the Freehold Borough Municipal Youth Guidance Council, the Freehold

Borough Citizens Participation Committee for HUD, or the Freehold Borough Board of Assessment, "primarily because they are committees of other branches of government, and also they involve a significant likelihood of involvement in political activity." The letter further advised Mrs. Randolph that she could not continue as an officer in the National Association for the Advancement of Colored People and the United Progressive Homeowners and Taxpayers Association, Inc. because these activities also hold a substantial potential for political activity.

On May 6, 1983, the Assignment Judge of Monmouth County entered an order for compliance with these restrictions, requiring the Sheriff of Monmouth County to reassign Mrs. Randolph should she continue to be engaged in these outside activities. On May 30, 1983, a notice of

petition for review on behalf of the Sheriff of Monmouth County was filed with the Supreme Court. The Supreme Court granted the petition and ordered a factual hearing as to the organizational activities of Mrs. Randolph. 94 N.J. 549 (1983). A hearing was held on October 21, 1983 before a judge of the Superior Court of Monmouth County. That court submitted recommended findings of fact in accordance with the Supreme Court's order. The petitioner does not take exception to any of those findings, merely adding to them that Mrs. Randolph is the mother of four children and that on the modest salary of a court attendant she supports herself and her youngest son, who is about to enter college; that she has been involved in community activities for over thirty years; that she is an exemplary citizen whose service to the community has gained her

many awards, and is deeply committed to the service of her community.

It is no longer appropriate to dispatch such worthy goals and desires with an epigram as Justice Holmes could do when sitting on the Supreme Judicial Court of Massachusetts: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892). "It is [now] too late in the day to doubt that the liberties of * * * expression may be infringed" indirectly, but just as improperly as directly, by labeling them as conditions upon the privilege of employment. Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965, 971 (1963). Public employees do not shed their constitutional rights when they undertake such service. Hence,

careful attention must be paid to Norma Randolph's petition to engage in the activities while she serves as a judicial employee. None doubts that she is indeed an exemplary citizen whose desire to continue to serve her community on its public boards and through community organizations fulfills for her a deep commitment to help others. The question is whether that desire can be reconciled with the public's need for confidence that the judiciary will be unquestionably impartial in resolving the disputes that necessarily arise in community life.

II.

In Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Supreme Court reviewed its development of the law relating to the rights of government as employer to regu-

late the speech of employees. In Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), the Supreme Court held that government cannot condition public employment on the surrender of First Amendment rights. Nonetheless, in Pickering v. Board of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Court recognized that government as an employer has interests "in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Id. at 568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817.[1] In Pickering, the Court

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[1]An example is a recognition that provisions that prohibit political activities by federal or state employees are constitutionally permissible. See Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), and United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-

(footnote continued)

invoked a balancing test: the First Amendment rights asserted by the employee must be weighed against the disruptive effect of the activities on the govern-

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(footnote continued from previous page) CIO, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). Letter Carriers upheld the authority of the federal government to prohibit its officers and employees from engaging in political activity or making political contributions. Broadrick upheld the parallel authority of state governments to prohibit broad categories of employees from taking active roles in organized political activity. Acknowledging that the statute was "directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments", the Court stated that "there is no question that [it] is valid * * * insofar as it forbids classified employees from * * * becoming members of national, state, or local committees of political parties * * *." 413 U.S. at 616, 92 S.Ct. at 2918, 37 L.Ed.2d at 842-43. "Employees of state and local governments may be subject to a 'little Hatch Act' designed to ensure that government operates effectively and fairly, that public confidence in government is not undermined, and that government employees do not become a powerful political machine controlled by incumbent officials." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 n. 27, 97 (footnote continued)

ment's ability to provide services. 391 U.S. at 568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817.

In Connick v. Myers, supra, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708, the Court refined the test by holding that if "employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," disciplinary measures taken in response to such expression cannot be challenged under the First Amendment absent the most unusual circumstances. Id. at 146-47, 103 S.Ct. at 1689-1690, 75 L.Ed.2d at 719-20. In that case an assistant district attorney about to be transferred from one section of the criminal court to another circulated a questionnaire among her colleagues soliciting

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(footnote continued from previous page)
S.Ct. 1782, 1797 n. 27, 52 L.Ed.2d 261, 281 n. 27 (1977).

their views about office conditions. The prosecutor, viewing this as a "mini insurrection," fired the assistant prosecutor. The Supreme Court held that the protection afforded under Pickering extends only to "matters of legitimate public concern" and regarded this incident as only an individual grievance. It therefore was not a matter of public concern (with the exception of one issue concerning pressure to work in electoral campaigns).

We need not engage in the sharp debate that divides the Supreme Court over Connick's threshold requirement of a "public concern" test for protected employee speech and expression. Here, there is no question that Norma Randolph's concerns are deeply public and invoke none of the strictly internal employee grievances that Connick speaks of.

Both the majority and the dissent on the Supreme Court would appear to agree that the Pickering-Connick rationale is to seek a balance "between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption." Rowland v. Mad River Local School Dist., _____ U.S. _____, _____, 105 S.Ct. 1373, 1376, 84 L.Ed.2d 392, 395 (1985) (Brennan, J., dissenting from denial of certiorari in Mem. No. 84-532).

Petitioner contends that In re Hinds, 90 N.J. 604, 614 (1982), mandates a stricter standard under the New Jersey Constitution, requiring a court to consider that:

> First, the limitation must "further an important or substantial government interest unrelated to the suppression of expression." Procunier v. Martinez, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224, 240 (1974). Second, the restriction must be "no

> greater than is necessary or essential to the protection of the particular governmental interest involved." [Id.]

We must observe, however, that Hinds did not arise in the context of employee speech. Hinds was an attorney speaking on the quality of justice in a pending trial. Had a court employee undertaken to offer a rebuttal expressing an opinion on the defendant's guilt, there can be no doubt that the judiciary as employer would have been able to prohibit such interference with the defendant's right to a fair trial. The Pickering Court specifically declined to state a "general standard" by which all conflicts could be judged. Note, "Politics and the Non-civil Service Public Employee: A Categorical Approach to First Amendment Protection," 85 Colum.L.Rev. 558, 560 (1985).

We are satisfied that the balancing process to be employed will take into account the two factors of Hinds as we weigh in the balance the substantial interest of the judiciary, the forms of expression involved, and the availability of other means to achieve the goals of the judiciary. We believe that the same considerations are implicit, if not explicit, in the analysis under both constitutions and point toward the same result. See Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). We do not perceive, then, the protections afforded by the New Jersey Constitution as distinctly different in this context. Hence, we must focus carefully on the specific activities and expression that the employee wishes to continue in order to determine whether these activities will have a disruptive effect upon the work of the judiciary.

III.

We begin by emphasizing New Jersey's unique commitment to an independent judiciary. This concern for an independent judiciary is at the heart of the American legal system. One of the great advances made in the structure of government by our Federal Constitution was its provision for an independent judiciary whose judges could perform their duties as they saw fit without fear or favor. The plan of our Federal Constitution was to preserve as far as possible the liberty of our people by guaranteeing that they have judges wholly independent of the government or any of its agencies. A judiciary is not independent unless courts of justice are enabled to administer justice, absent pressure from without.

> Especially in the administration of the criminal law--that most awesome aspect of government--society needs independent courts

> of justice. This means judges free from control by the executive, free from all ties with political interests, free from all fears of reprisal or hopes of reward. The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. [Pennekamp v. Florida, 328 U.S. 331, 356-57, 66 S.Ct. 1029, 90 L.Ed. 1295, 1309 (1946) (Frankfurter, J., concurring).][2]

The founders of our institutions, deeply distrustful of judges beholden to the Crown, sought to guarantee forever liberty under law. To preserve

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[2]Justice Frankfurter recalled the words of John Adams on the First Constitution of Massachusetts:

> It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. [Article XXIX of the Declaration of Rights of the Constitution of Massachusetts (1780).]

their freedoms, they created three branches of government, and vested executive, legislative, and judicial powers in these separate agencies to guarantee the independence of each. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 962, 103 S.Ct. 2764, 77 L.Ed.2d 317, 351 (1983) (Powell, J., concurring). The judicial article of our 1947 Constitution largely mirrors Article III of the United States Constitution. Our judges shall be appointed by the Executive with the advice and consent of the Senate; they "shall hold their offices for initial terms of seven years and upon reappointment shall hold their offices during good behavior." N.J. Const. of 1947 art. VI, sec. 6, paras. 1 and 3. They are and must be divorced from all aspects of public life. "They shall not, while in office, engage in the practice of law or other gainful

pursuit." N.J. Const. of 1947 art. VI, sec. 6, para. 6. Like judges in the federal system, they are to hold their office during good behavior, their compensation is not to be diminished during their continuation in office, and they may be removed only by impeachment or statutory removal proceedings. N.J. Const. of 1947 art. VI, sec. 6, paras. 3, 4 and 6. In addition, they shall hold no other office and "[a]ny such Justice or Judge who shall become a candidate for an elective public office shall thereby forfeit his judicial office." N.J. Const. of 1947 art. VI, sec. 6, para. 7. The Code of Judicial Conduct recommended by the American Bar Association and adopted by this Court reinforces the strict impartiality of the judiciary. In particular, Canon 7 of the Code of Judicial Conduct admonishes a judge to refrain from political activity.

Our Court's concern for restriction of activities has been evidenced by restrictions upon judges that exceed the minimum restrictions imposed by the Code of Judicial Conduct. For example, we believe that we are alone in expecting that judges will not teach or lecture for compensation. In short, we have imposed restrictions in the public interest and in the interest of an independent judiciary that far exceed the minimal restrictions suggested by the American Bar Association Canons.

This policy has been implemented by Rule 1:17-1, which applies the ban on political activity and candidacy for an elective public office not only to judges but to all court personnel. The rule provides:

> The following persons in or serving the judicial branch of government shall not hold any elective public office nor be a candidate therefor, nor engage in political activity * * *:

(a) Judges;

(b) The Administrative Director of the Courts, the Clerk of the Supreme Court, the Clerk of the Superior Court, the Clerk of the Tax Court, and all employees of their respective offices, and official court reporters;

(c) Probation officers and all employees of county probation departments;

* * * * * * * * * *

(f) Law secretaries, stenographers, sergeants-at-arms, court criers, assignment clerks, courtroom clerks, court attendants and all public employees regularly assigned to a judge or court;[3]

* * * * * * * * *

(i) Clerks, deputy clerks, violations clerks and all persons employed by or regularly assigned to a municipal court.

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[3]Rule 1:17-2 provides that the ban on political activity does not apply to all employees of sheriffs but only to sheriffs' employees who are specifically referred to in Rule 1:17-1. As noted, Norma Randolph is a court attendant who serves as a court crier and is regularly assigned to a judge or court.

At stake here is the fulfillment of the constitutional ideal:

> It was almost fortuitous that the pre-1948 system produced so many fine judges and was in fact so seldom touched by the pressure of outside politics. In any event, the turnabout in 1948 was complete, such that there exists today a court system independent of partisan political or other outside pressures of any kind. So was and is being served the interest of the people of New Jersey in an independent judiciary. [In re Gaulkin, 69 N.J. 185, 192 (1976).]

What can we say of this ideal of judicial independence that has not been said? That "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution," The Federalist No. 78, at 484 (A. Hamilton) (H. Lodge ed. 1888); that any "lessening [of] the independence of the judiciary [attacks] not only the judicial power, but the democratic republic itself," A. de Tocqueville, Democracy in America 289

(Vintage Books 1945); that "we would rather have an independent Court, a fearless Court, a Court that will dare to announced its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact," S. Rep. No. 711, 75th Cong., 1st Sess. 14 (1937) (rejecting the 1937 court-packing plan). These are not the words of dreamers, these are the words of realists reminding us to remain true to the ideal. The judiciary seeks to advance these governmental interests by its rule proscribing political activities by judicial employees. That ideal requires "judges beholden to no man, independent and honest and -- <u>equally important</u> -- <u>believed by all men to be independent and honest</u> * * *." Chief Justice

A.T. Vanderbilt, The Challenge of Law Reform (Princeton Univ. Press 1955) at 11 (emphasis added).

IV.

In application of the rule to petitioner, several threshold questions have been raised. The first is whether we should limit our rule to partisan political activity. Petitioner points out that the prior rule referred to "partisan political activity," rather than simply "political activity," suggesting that such interpretation would fully effectuate the purposes set forth in Canon 7 of the Code of Judicial Conduct. We disagree. There is more to political activity than party politics. Those who "attempt to influence governmental policymaking, their activities -- and the views of members who disagree with them -- may be properly termed

political." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231, 97 S.Ct. 1782, 1787, 52 L.Ed.2d 261, 281 (1977). In our pluralistic society advocacy organizations play a vital role in the exercise of political power. Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. ___, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). It is naive to think of even advisory boards or bodies as not influencing the body politic. It has been traditional in New Jersey's judiciary to construe "political activity" to include activity supporting or opposing different sides of social, political, and legislative issues. Not only is a judge prohibited from engaging in political activities, Canon 7, but the permission of Canon 5(B) to engage in "civic and charitable activities" is qualified by the language that they "not reflect adversely upon his

impartiality or interfere with the performance of his judicial duties" and further that the organization is "not conducted for the economic or political advantage of its members." Our construction of the restriction on political activity to cover issue activity is based on the inevitable identification of the judge with the particular parties, organizations, or candidates advocating positions on the issues that may come before the court. Simply put, issue activity is political activity. Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). Moreover, the consistent administrative interpretation of our Rule, even in its prior form, has been to limit outside political activities, even those that were not partisan in nature. As we shall see in the substantive discussion

of the petitioner's activities, we are convinced that there is a clear danger to the appearance of neutrality that must be maintained by all connected with the judiciary, including judges and employees.

Second, petitioner contends that although these restrictions are appropriate for judges, they are unnecessary for nonjudicial employees whose role in the system is not perceived as being as direct as that of the judge. The Pennsylvania Supreme Court in In re Prohibition of Political Activities by Court-Appointed Employees, 473 Pa. 554, 375 A.2d 1257 (1977), articulated the reasonableness of such political activity bans on persons such as assistant probation officers by stating: "The purpose of [the ban], of course, was to maintain not only the independence, integrity and impartiality of the judicial system but also the appear-

ance of these qualities." Id. at 560, 375 A.2d at 1259 (emphasis added); see also Opinion of the Justices to the Senate, 375 Mass. 795, 376 N.E.2d 810 (1978) (judicial employees may be required to file financial disclosure statements to sustain confidence in impartiality of justice system).

Thus, in Connealy v. Walsh, 412 F.Supp. 146 (W.D.Mo. 1976), an officer of the juvenile court was terminated from her job because she refused to remove a "McGovern" bumper sticker from her car. The court upheld the dismissal largely because of the possible appearance of bias and the potential effect of a display of political affiliation on her relationship with those individuals she was to help.

The court in Connealy emphasized that where the employee's duties "require establishment and maintenance of

a relationship of trust and confidence ... the state has a valid interest in prohibiting activities which would adversely affect that relationship." Id. at 156. Regardless of the affiliation, there are members of society who see such symbols as signs of oppression or enmity, which when identified with the judiciary or its employees are equally dangerous to the independent stance of the judiciary.

> [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent. [Id. at 158 (quoting Civil Service Comm'n v. Letter Carriers, supra, 413 U.S. at 565, 93 S.Ct. at 2890, 37 L.Ed.2d at 809).]

Missouri's interest in preserving public confidence in the fact and appearance of the integrity and impartiality of the judiciary was compelling and outweighedthe

employee's interest in publicly expressing her political preference. Connealy v. Walsh, supra, 412 F.Supp. at 158; see also Philips v. Adult Probation Dep't of San Francisco, 491 F.2d 951 (9th Cir. 1974) (deputy probation officer may be prohibited from displaying signs expressing opinion in favor of fugitive radicals). But see Abbott v. Thetford, 529 F.2d 695 (5th Cir. 1976) (judicial prohibition against institution of litigation by probation officer invalid because motivated by judge's disapproval of the litigation, not disruption of court practices).

In each of these instances it is recognized that speech, association, and expression of judicial employees may be restricted if there is a substantial likelihood of interference with or disruption of the administration of the court's

services. It is the practice that we have long followed.

> Since 1948, when the judicial system created by Article VI of the 1947 Constitution came into existence, judges and others officially associated with that court system have been wholly divorced from involvement in partisan or other political activity, as a necessary sacrifice for the sake of judicial integrity and public appearance thereof. [In re Gaulkin, supra, 69 N.J. at 189 (emphasis added).][4]

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[4]Petitioner also contends that the language of the rule is vague and ambiguous, resulting in an unconstitutionally-overbroad restriction on public activities. We are satisfied that the proscribed activities are capable of being understood by the persons who must guide their conduct thereby; and, in any event, we are satisfied that the due process afforded to the employee by the proceedings held at the trial level and by our substantive review prior to the imposition of any remedy fully vindicates the employee's interest in procedural fairness. Each member of the judiciary or court support personnel who applies to the court for permission to serve with an organization receives the same consideration with respect to the decisional process and factual hearings can be entertained in any proceeding appropriate to decision.

That continuous tradition was molded in a series of decisions, the most prominent of which followed closely upon the adoption of a 1961 Court Rule specifically banning partisan political activity by court employees and requiring the covered employees to request prior approval to hold any other public office.[5] In the early years following the adoption of the Rule, the Court quickly determined that the prohibition of "partisan political activity" was

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[5]The 1961 rule (R.R. 1:25C(a)) was amended in 1969 to conform substantially to its present form as it appears in Rule 1:17-1. The comment published in 1967 in connection with this rule change recited:

> 1. The introductory sentence of this rule substitutes the phrase "political activity" for "partisan political activity" in the source rule. The word "partisan" has been dropped since the Supreme Court has interpreted the present rule as barring those persons covered thereby from being active in non-partisan political elections.

broader than the concept of traditional party politics. Thus, it ruled that judicial employees should not be active in non-partisan movements to change the forms of city government or in voter registration drives because such activity was, although non-partisan in the party sense, clearly political in the sense of involving the judiciary in political activity. In a series of decisions interpreting the Rule, the Court would not permit court attendants or court aides or court clerks or probation officers to serve, among other things, as members of a local board of education, on a board of adjustment, as a tax assessor, on a commission for youth and economic rehabilitation, on the municipal utilities authority, in an anti-poverty program, on a county community action planning committee. These restraints, as noted, became express follow-

ing the 1969 amendment to the Rules that specifically prohibited any form of political activity by court officials; and, generally speaking, since then our decisions have precluded service by such persons as probation officers and court clerks on parking authorities, boards of adjustment, planning boards, library boards, boards of health, drug abuse commissions, local property owners' associations, youth guidance councils, and a national political organization of women. At the same time, the Court was not intractable in adopting a rule that would ban all outside activity by court employees. Its decisions reflect a focus on two guiding factors: (1) the closeness of the employee to the judge; and (2) the probability that the political issues, whether partisan or not, are those around which

political campaigns might be shaped.[6] From these decisions and principles, then, we have distilled a flexible rule that is tailored to the relationship or proximity

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[6]Chief Justice Weintraub articulated the first factor most clearly in remarks to new judges in 1968 when he explained the Court's policy on supporting personnel and related it to the public perception of justice:

> Generally the idea is whatever restrictions apply to the judge apply to the supporting personnel in the courtroom. That will mean that your court clerk, the court attendant, who actually in some counties, perhaps most, is an employee of a sheriff's office and is assigned over to the judicial branch, he is subject to all the limitations with respect to political activity, and so on, that apply to the judge. That can become a little bit sticky.
>
> I had a call recently from a gentleman who couldn't understand it.** I suggested to him that it would be very easy if he simply had the sheriff assign him to duties outside of the courthouse. By courthouse I mean courtroom. If they are assigned out we have no interest in them. We are concerned with those that are assigned to the courtroom.*** If he wants to be on

(footnote continued)

of the employee to the decision-maker and to the nature and extent of the political activities sought to be engaged in by the employee. Each case requires a careful balancing of the interests involved. Thus the Court has determined that service by a probation officer on a municipal shade tree commission be approved because the appointment was not likely to involve the officer in controversy; that a probation officer be allowed to serve on a county advisory committee on alcoholism because of the special role of the probation services in understanding such concerns and because of the assistance it could render in the program and the limited role of the agency itself. These decisions reflect a balance that is related to the closeness

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(footnote continued from previous page)
our end, on our side of the fence, he has to abide by the same restrictions that apply to us. The prohibition on political activity is absolute.

of the employee to the judicial decision-maker and the realistic likelihood that the activities will become the focus of public controversy.

Our dissenting members chide us on two scores: they claim that we have adopted a "blanket ban" on all community and civic involvement, post at 474, but at the same time accuse us of inconsistency through "uneven application," post at 464. What they see is a process at work. In almost every judicial decision, sound arguments can be made for the opposite result. Only the actual exercise of that balancing process will determine whether the activities pose a realistic likelihood of involving the employee in important and recurring public issues that are a frequent subject of political controversy, that create the appearance of judicial involvement in those issues, and that gen-

erally give the appearance of a judiciary lacking in impartiality on the issues involved.

V.

With these specific principles for guidance, we turn to the particular activities to determine whether they can be continued without offending the outlined principles and without disruption of the governmental activity of the judiciary.

A. Public Organizations

The Monmouth County Mental Health Board, the Freehold Borough Board of Assessment, the Freehold Borough Youth Guidance Council, and the Freehold Borough Citizens Participation Group HUD, are public organizations established according to statutory authority. Each plays a role designated by statute, regulation, or

ordinance in government and public affairs.

The Monmouth County Mental Health Board is a public body established by N.J.S.A. 30:9A-3. It is an agency of county government. Among its duties established by N.J.S.A. 30:9A-5 are involvement in the selection of community mental health service projects to be funded by the State; the development of a comprehensive plan of community mental health services; and the recommendation of the amount of state financial aid to be allocated to each such project in the county. The Board must necessarily involve itself in legislation that involves the funding for mental health projects. (Pending resolution of this matter, Mrs. Randolph was not reappointed to this board.)

The Freehold Borough Board of Assessment is established pursuant to N.J.S.A. 40:56-1, in particular N.J.S.A. 40:56-21. Its function is to make assessments of benefits accruing from local improvements in the Borough. The Board is to examine real estate in the vicinity of a local improvement to determine what lands have been benefited and also to fix and determine the amount of damages accruing to any property by reason of construction of municipal facilities.

The Citizens Participation Group of the Freehold Borough HUD is an organization constituted under federal regulations of the Department of Housing and Urban Development (HUD) that required citizens' participation for Community Development Block Grants funded through the Housing and Community Development Act of 1974, 88 Stat. 633, as amended, 42 U.S.C

§§ 5301-5320 (1976 ed. and Supp. V). Under that act, the Secretary of HUD was authorized to dispense federal block grants to state and local governments and nonprofit community organizations for urban renewal programs such as the rehabilitation of residential structures, code enforcement in deteriorating areas, and the construction of public works projects. The function of such a group is to hold public hearings and determine the establishment of priorities for the expenditure of funds allocated to the communities in connection with the community block grant program.

The Borough of Freehold Youth Guidance Council is a public body established pursuant to N.J.S.A. 9:22-1. Its purpose is in part to serve as a "pre-complaint diversionary program." Instead of signing juvenile complaints, police

officials may refer them to the Youth Guidance Council, which makes a recommendation for corrective action. The Council has no powers of enforcement or direct connection with the court system.

None of these organizations endorses political candidates or is involved in partisan politics, but the first three of them are deeply involved in the political activity of the community. The determination of which section of the community shall receive community development block grant programs can be a highly charged political decision. Such a decision has a realistic likelihood of involvement in litigation if dissatisfied citizens protest the action of the governing body in adopting its plan for participation in the community-development block-grant program. Few subjects are more controversial than a public improve-

ment. The citizen whose lands have been the subject of a road improvement or a sewer assessment finds himself or herself deeply embroiled in a community dispute about the wisdom or necessity of the improvement. An equally realistic likelihood for public controversy arises with respect to the determination of funds and sites for community mental health programs. Although the number of citizens involved in such work is not large, their concern is deep.

The Freehold Borough Youth Guidance Council serves as an alternative to judicial enforcement. Individuals and families who have been subjected to its process and who later appear in court might understandably feel that their position was somewhat compromised by their prior involvement with the court employee in the employee's municipal capacity. In

addition, citizen complainants affected by the disposition of a juvenile matter may be aggrieved if the community representative is at the same time a court employee. Finally, one of the agency's missions is to respond to a court's finding that the child's delinquency is "attributable in whole or in part to the existence of deleterious, degrading or deteriorating conditions, practices or influences within the municipality." N.J.S.A. 9:21-1.

Hence, we perceive in each of these governmental agencies a realistic likelihood of involvement in community disputes. These disputes are intensely political in the sense that they are directly aimed at government action or inaction, and often reflect the viewpoint of larger political movements. Such movements may transcend partisan party activities. Such disputes divide the members

of a community in its most political activity, that of self-government. More often than not such issues will correspond directly with partisan political activities. Indeed, they may include both major parties on one side or the other, but they are always bitterly partisan in a factional sense. These issues very often wind up determining positions of the parties and the voting of citizens in a local election.

Moreover, the very appointment of the judicial employee to the position is an involvement in politics. Members of government boards are not drawn from a computer list of available citizens as, for example, jurors are. They are chosen by elected political figures who cannot be faulted if they yield to political wisdom in their selections for governmental boards. Realistically, such appointments

come about through politics in the broader sense. The dissent would have us trace the origins of such appointments to assure ourselves of their pristine nature. Post at 466. That is simply unfeasible if not impossible.

Finally, it is another reality that courts are frequently called upon to resolve the disputes that arise from the exercise of political choice by these boards. (If there is any doubt that such activities cast participants in such public affairs into the center of judicial controversy, a random survey of recent decisions will disclose the extent of judicial involvement. See Appendix, post at 455-457. And whether litigation ensues or not, each of the parties involved in such local controversy should enjoy the fullest confidence that the court system has no stake in the controversy. We simply do

not want anyone walking into a judge's courtroom on any matter thinking that the judge is somehow connected with the person who made the assessment, or who participated in it, or the person who tried to have all the money allocated to the development project that the litigant bitterly opposes. More importantly, we do not want the public wondering whether the judge may share the views of that judicial employee; we want every person walking into that court to understand that the judge and the entire court are dispassionate and impartial.

B. Private Organizations

Norma Randolph is involved in two private organizations; the United Progressive Homeowners and Taxpayers Association, and the National Association for the Advancement of Colored People.

When we view these activities, we must keep in mind the contrasts between membership in committees of other branches of government and private associational activity. In the former context, in striking the appropriate constitutional balance we place on one side of the scales of justice the Court's right and duty to preserve the independence of the judiciary, and on the other side the employee's fundamental right to free speech and association. We recognize the difference between someone who is close to the decision-making process, such as a judge or a law clerk, and someone who may perform similarly important functions but is not close to that process, such as a court aide. The fact that a court aide is employed by the county sheriff rather than the judiciary should be weighed with the fact that the aide works in and around the

courtroom. The difference between partisan and non-partisan political office and the further distinction between appointed positions that are close to the heart of government and those that are more remote should also be considered. Appointment to any public office poses a greater likelihood of impermissible judicial involvement in other levels of government and the political process. For this reason we agree with the conclusion below that Mrs. Randolph may not continue in her public positions.

She argues that her service as an officer of a local chapter of the NAACP and of a homeowners' association does not pose an equal threat to the independence of the judiciary. While such organizations may, in some sense, be educational and civic in nature, they have also become organizations with political goals, in the

broader sense mentioned above. There are very few issues today with a more significant legislative and political content than civil rights. It is, as a practical matter, almost impossible to deliver the most dispassionate lecture on the subject without the highest risk of being perceived as a partisan for or against legislation and, sometimes, for or against particular candidates or office holders. Hence, we must carefully examine the organizations and petitioner's role in them.

The United Progressive Homeowners and Taxpayers Association is an organization that was formed as a direct outgrowth of the Citizens Participation Group of the Freehold Borough for HUD. The organization has no affiliation with any political party, does not endorse political candidates or seek to influence

legislation. It was involved directly in soliciting funds from the community to develop a county-owned building known as the "Court Street School" as a community resource facility. Norma Randolph is second vice-president of the organization; her name is on the letterhead. She describes her duties as being to fill in for the president and first vice-president if necessary. Petitioner negotiated directly with county officials for the allocation of funds; she has been described as the spokesperson for the organization; and serves as the liaison representative of the Greater Red Bank NAACP to this organization.

We are satisfied that on this record petitioner's advocacy role on behalf of this organization in the solicitation of funds from public agencies and in its efforts to influence the appropriation

or allocation of public funds to the development of the community center possesses the realistic likelihood for political conflict between competing community groups over the allocation of these diminishing resources. Consequently, we cannot sanction continued public involvement in issues that pose a realistic likelihood of compromising the independence of the judiciary.

Our final and most sympathetic concern is with Mrs. Randolph's desire to continue to serve as an officer of the Greater Red Bank Branch of the National Association for the Advancement of Colored People. Knowledge of its purposes and goals is part of our national culture. See NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963). Its members seek, through cooperative organizational activity, to achieve the legitimate

political goal of eliminating all racial barriers that deprive black citizens of the privileges and burdens of equal citizenship rights in the United States. Id. at 430, 83 S.Ct. at 336, 9 L.Ed.2d at 416. To be thus involved is a deeply felt goal of its members for "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and assocation." Id. at 431, 83 S.Ct. at 337 , 9 L.Ed.2d at 417 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250-51, 77 S.Ct. 1203, 1211-1212, 1 L.Ed.2d 1311, 1325 (1957)).

Yet we cannot deny that in conducting its activities the organization would be unfaithful to its purposes if it did not seek to hurl itself into the center of the deeply divisive political controversies that surround the elimination of every trace of prejudice and bias in

our society. The charter of the Greater Red Bank Branch of the NAACP evidences commitment to the same goals. In achieving these goals, although non-partisan, the organization cannot and should not refrain from political activity in the broader sense of influencing governmental policy. Among its committees is a political action committee whose duties, according to the constitution and by-laws, include to:

1. Seek to increase registration and voting.

2. Work for the enactment of municipal, state and federal legislation designed to improve the educational, political, and economic status of minority groups.

3. Seek the repeal of racially discriminatory legislation.

4. Work to improve the administration of justice.

5. Work to secure equal enforcement of the law.

6. Keep the National Office and the Branch informed of all pro-

posed legislation which affects minority groups. The Committee shall be non-partisen and shall not endorse candidates for public office.

The Red Bank chapter does not support or oppose specific political candidates. Once a year, however, the branch does host a "Candidate Night" on which all candidates are invited to present their views; local press coverage of the event in 1983 is part of the record below. The organization's primary work consists of efforts to register voters. All of its members participate in house-by-house canvassing for registration, and on election days, including the day of a school board election, members record non-voters and offer transportation to polling places. No record or apparent effort is made to ascertain or advocate a particular party affiliation of any voter.

In this case the record discloses as well that in the period of inquiry the Greater Red Bank Branch had been actively involved in public positions with respect to the discriminatry effect of various public issues. These and other community issues are deeply political, involving the most fundamental of governmental choices. In our state not all would agree that the premises of Mount Laurel II reflect the harmonious accomodation of mutual interests of the various members of society. It was the Southern Burlington County NAACP that was the party-plaintiff in the original litigation that brought the issue to court. See Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158 (1983). Concededly, Norma Randolph's branch is not now involved in such pending or current litigation. Yet when the parties to such

litigation are ushered into the courtroom, are administered the oath, and the case proceeds, we must ask whether they would have the fullest confidence knowing that an officer of the court was at one and the same time an officer of an organization actively pursuing the litigation. And even if the organization were not itself an active party litigant, every citizen involved in these deeply controversial public issues should share the unshakeable confidence and stands ready, if called upon, to decide dispassionately and impartially appropriate issues that may be presented to it for adjudication.

On this record, we are left with a certainty that an advocacy or leadership role by Norma Randolph in voter registration activities, candidates' nights, reallocation of surplus foods, or private-sector employment poses a realistic threat

of compromising the independence of the judiciary. These activities -- especially voter-registration drives and candidate nights -- inevitably spill over into the political arena. Since her duties as trustee or executive board member bring her into these public issues or controversies, holding such office while serving as a courtroom officer is inconsistent with the assurance that ours is an independent judiciary in fact and appearance. It cannot be permitted.

VI.

Our dissenting members recognize the same general principles that we do but they differ in their application of the Pickering balancing test. They differ from us in outcome because they see the court attendant's role as not sufficiently "sensitive to the decision-making process"

of the judiciary, post at 470, to warrant the restrictions that we would require of courtroom officers.

They see a gulf between the judge and the court officer and they assume that litigants and the public will see the same gulf and disassociate the two. Hence they claim to see no danger to the independent stance of the judiciary. Their logic would lead to a courtroom with a judge presiding over trials with the aid of the head of the local political party or possibly a highly-detested political activist organization. This case cannot be decided as if petitioner were the only court aide in the system. We must ask ourselves how independent the stance of the judiciary remains when not one but many, or indeed all, of the aides in a courthouse participate in political affairs or other activities that spill

over into the political arena. If the dissenters shrink from such a vision, it is not because of principle but because of the way they view the brand of politics that is being practiced. Of course, we agree that the purposes of the NAACP are consistent with American ideals, but we would not establish a principle upon the basis of whether or not we like the politics or political activity of the court officer.

Nor would we yield to federal practice that limits court clerks' activities only in the area of partisan politics. So deep and so strong is the tradition of an independent federal judiciary that its history may never have reflected the concerns that we experienced in the transition from a prior system. Moreover, federal district courts and officers are often distant from the arena of contro-

versy. The rules that we fashion must be relevant to a system formed upon the county court house and municipal court. In such a system, court personnel are the community members.

The dissent suggests further that we should better leave the matter to the presiding judge to resolve the court-room conflicts "as they arise." Post at 474. This suggestion is impractical. It presupposes a court system Olympian in calendar-control practices. Our system is somewhat different. A trial judge is handed a matter often on short notice. We would rather have the judge focus on the substantive legal issues found in the jacket rather than canvass memory to determine whether one of the courtroom officers should be asked to step aside. For the most part, to apply such a rule would be impossible in the smaller courts

such as our municipal courts where there is no one to step aside for. It is a path that has been suggested in other areas of disqualification and one that we have rejected. See Greenberg v. Kimmelman, supra, 99 N.J. at 574-75. It is not simply the administrative difficulty of having the clerk step out of the courtroom. The fact is that the damage is already done. As long as the public remembers the judicial employee's activity in a controversial political issue, that person and the court are stamped with that memory. It is that stamp of partisanship that cannot be eradicated.

Finally, we are encouraged to disregard the authorized work of the petitioner and conclude that her activities are limited to those of filling water glasses and other menial tasks, as the dissent would suggest, post at 469. In

addition to degrading the status of Norma Randolph, such a conclusion would rquire the Court to engage in highly individualistic determinations with respect to each court attendant as to the functions and duties assigned by his or her particular judge. We cannot fashion principles of law on the basis that an individual courtroom attendant had not yet "received a direct order from a judge." Post at 469. It would bewilder our trial judges to suggest that they should be careful about directly addressing courtroom attendants lest they become too closely identified. The reality of our system is otherwise. Court attendants are usually assigned to an individual judge. They become a closely-knit team. We cannot evaluate the relationship between each judge and each court officer. The relevant factor is, as Chief Justice Weintraub pointed out, that she

has been assigned by the Sheriff to the courtroom. She is authorized to perform important public duties in connection with the administration of justice. We demean her and her office by suggesting that the duties are not closely related to the business of the judiciary. Whether we intend the effect or not, for many witnesses and litigants the court attendant presents a close association with the judicial process. She is indeed far more visible than the court clerk, law clerk, or secretary of the judge. We conclude that her identification with the judge is sufficient to meet the criteria outlined for creating the appearance of judicial involvement in controversial political issues.

VII.

We deeply respect the desire of Norma Randolph to continue to participate in these organizations, public and private. It is a commendable desire. But so long as she serves on the side of the judiciary, we must come down on the side of preserving the independent role of that judiciary.

> In all cases great or small this must be to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it. No man or group is above the law. Nor is any beyond its protection. * * * These truths apply equally to the Government. When its power is exerted against the citizen or another in the nation's courts, those tribunals stand not as partisans, but as independent and impartial arbiters to see that the balance between power and right is held even. [U.S. v. United Mine Workers of America, 330 U.S. 258, 342-43, 67 S.Ct. 677, 719-720, 91 L.Ed. 884, 938 (1947) (Rutledge, J., dissenting) (citation ommited).]

It is not without significance that the symbol of justice shields her eyes from the contestants. The face of justice must be disinterestedly detached. We do not believe that we must prove beyond debate that this detachment is necessarily lost, or that litigants will start to think that a judge will be partial to a particular group or philosophy, because of association with politically-active court personnel. More is at stake here than proof of prejudice. We think that there is a much more subtle value involved, and do not think the Constitution prevents us from promoting such values, even if they are difficult to describe or prove, so long as they represent something very important. There is a tone, a feeling, an atmosphere, of impartiality that should surround everything that has to do with the judiciary. That subtle value is des-

troyed or damaged each time that someone closely connected with the Courts does something that judges should not do even though they are not judges. The value involved is enormous. It is not just "trusting the court." It is a feeling of total confidence that when you step into a courtroom, you are inside an institution that has taken every care not only to judge your case fairly but to give you confidence that it will be judged fairly. That feeling will be lost if you must take the oath from one who has campaigned vigorously against your case, if you must have jurors placed under the watch of a bitter foe, if you must see a judge's clerk who is a leader of the movement that abhors the goals of your lawsuit. And that lost feeling will go well beyond the question of whether the judge is deciding a particular matter dispassionately, with-

out fear or favor. It will go to the general impression the public has of the judge -- its impression of whether the judge is balanced, non-partisan, separated from all factions, someone who can handle the matter with a totally open mind -- the kind of an impression and appearance that we are determined to maintain. That is the most fundamental reason why judges and their employees cannot be involved in the political activities that divide our communities. When a judge confers closely with a court aide, is seen with that court aide regularly, has the court aide at the right hand to help in the many things that have to do with the court itself, even if not with its decisions, people simply have the right to wonder just how non-partisan the court really is.

These are not abstract concerns. These are the realities of human experi-

ence. What litigants experience is the public face of justice. It is a face that includes much more than the judges; it includes everyone who works in that courtroom and everything that worker portrays to the public. The face that the public sees should have the appearance of total honesty and total impartiality. That impartiality will be lost when the visible face of the judicial system, presented through its employees in a courtroom, portrays a commitment not only to one of the parties or issues involved in litigation before the court but to any partisan cause. To preserve that independence and impartiality for all, our employees must forego roles in the public political arena.

Despite the suggestions of the dissent, we impose no restrictions on the rights of the individual judicial employee

to associate freely with the private organizations such as are present here, and there is no question presented with respect to the employee's membership either in the NAACP or her neighborhood association. Here, as elsewhere, each described activity requires that we make a careful balance of "contesting constitutional interests." State v. Williams, 93 N.J. 39, 62 (1983). We believe that the constitutional interests are best sered by the defined restrictions on public political activities of the subject court attendant. We have decided this case on the basis of the record before us related to public political activity. If there is a role as officer in the private organizations that petitioner can fulfill, not as advocate, leader, or spokesperson in the public forum, we will sympathetically evaluate the request. This case comes to us as a

direct challenge to the application of our rule to a court attendant with the defined outside activities.[7] On the record before us, she may not continue as officer, trustee or member of the executive committee.

For now Mrs. Randolph must refrain from the subject public activities. As noted, Rule 1:17-1 does not apply to other employees of the sheriff's office. We are hopeful that accommodation of the petitioner's interests in remaining in other public office can be found in the vicinage by employment in another capacity by the Sheriff than that of a court officer or court attendant. In ruling as we

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[7]We do not perceive this to be a case in which, in view of the apparent prestige, influence, and activity the employee may have in the organizations, the only role the employee may fulfill would be limited to payment of the regular membership fee and attendance at membership meetings. There may be leadership roles in the private organizations that will not spill over into the public political arena. That issue is not before us.

do, we impose no "absolute prohibition upon the civic and community activities" of judicial employees as our dissenting members choose to suggest. Post at 468. Rather, we carefully balance the relationship of the employee to the judge against the nature of the political activity. In doing so, we adhere to the time-tested commitment of our judicial system to an integrity so austere that not only judges but "others officially associated with that court system have been wholly divorced from involvement in partisan or other political activity, as a necessary sacrifice for the sake of judicial integrity and the public appearance thereof." (Chief Justice Hughes in In re Gaulkin, supra, 69 N.J. at 189 (emphasis supplied)).

The Order of the Law Division is affirmed.

Dixson v. United States, 465 U.S. 482, 104 S.Ct. 1172, 79 L.Ed. 2d 458 (1984) (officers of a private, nonprofit corporation administering and expending federal community development block grants are "public officials" for purposes of the federal bribery statute); National Wildlife Fed. v. Marsh, 747 F.2d 616 (11th Cir. 1984) (action to prohibit furtherance of city's redevelopment plan to insure that no less than 51% of funds would be used for activities which principally benefit persons of low and moderate income would be applied prospectively only to fiscal years subsequent); Atkins v. Robinson, 733 F.2d 318 (4th Cir. 1984) (low-income black residents of county brought class action against county, county board of supervisors, and others, alleging that board's veto of proposed

low-income housing development to be located in county and to participate in federal section eight housing assistance payment programs violated federal statutes and United States Constitution); Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid, 717 F.2d 964 (6th Cir. 1983) (nonprofit civic corporation brought an action against the United States Department of Housing and Urban Development, a city, and others due to city's alleged failure to comply with and HUD's failure to ensure compliance with, city's fair housing obligations); Tucson Community Dev. and Design Center, Inc. v. City of Tucson, 131 Ariz. 454, 641 P.2d 1298 (Ct.App.1982) (taxpayer's petition for declaratory judgment with respect to acts of city and its mayor and council, which declared area of city blighted and established a redevelopment plan); Kelso Corp.

v. Mayor of Baltimore, 45 Md.App.120, 411 A.2d 691 (Ct.Spec.App.1980) (landowner's challenge to city's block grant plan); Township Comm. of Edgewater Park v. Edgewater Park Housing Auth., 187 N.J.Super. 578. (Law Div. 1982) (township committee brought suit seeking to restrain federally funded housing authority from carrying out any of its undertakings); Township of Piscataway v. Concerned Citizens for Chronic Psychiatric Adults, 200 N.J.Super. 615 (App.Div. 1985) (dispute over group home for psychiatric patients); Mental Health Ass'n of Union County, Inc. v. City of Elizabeth, 180 N.J.Super. 304 (Law Div. 1981) (county mental health association brought action in lieu of prerogative writs against city and various city officials, seeking to enjoin defendants from interfering in any way with renovation and construction work on

plaintiff's community residence); Township of Washington v. Central Bergen Community Mental Health Center, Inc., 156 N.J.Super. 388 (Law Div. 1978) (township's action to prevent use of residential premises by former mental patients); Meglino v. Township Comm. of Eagleswood, 197 N.J.Super. 296 (App.Div. 1984) (property owner brought action challenging township's method of financing and implementing low pressure sewer system along low-lying areas subject to tidal flooding); McNally v. Township of Teaneck, 75 N.J. 33 (1977) (property owners appealed from township's confirmation of special assessments imposed against their property for street improvements); Gabriel v. Borough of Paramus, 45 N.J. 381 (1965) (municipality could assess property for local improvement when plaintiffs' direct benefit resulted from interceptor sewer line (which

tied into and was sole outlet of municipality's sewer system)); Kastens v. Town of West New York, 88 N.J.Super. 224 (App.Div. 1965) (action by property owners to compel return of monies paid by them on account of local improvement assessment which had been set aside); Csaki v. Township of Woodbridge, 69 N.J.Super. 327 (Law Div. 1961) (residents' challenge to sewer assessment); Cirasella v. Village of South Orange, 57 N.J.Super. 522 (App.Div. 1959) (appeal by property owners from confirmation by trustees of village of an assessment levied by board of assessment); Rutan Estates, Inc. v. Town of Belleville, 56 N.J.Super. 330 (App.Div.), certif.den., 30 N.J. 601 (1959) (arbitrary and discriminatory and therefore unlawful to demand that the last remaining unserved parcel, representing a small fraction of the municipality's total area, pay for the extension of

mains to serve it, and consequently portion of ordinance providing for such assessment was invalid); Jardine v. Borough of Rumson, 30 N.J.Super. 509 (App.Div. 1954) (statute authorizing levies against all lands within a sewer district to meet expense of operation and maintenance of sewerage system was intended to require that tax be levied only upon property benefited by sewage system); Sherman Holding Realty Corp. v. McGann, 81 N.J.Super. 48 (Law Div. 1963) (abutting owner challenged validity of a special assessment for street improvement.)

POLLOCK J., concurring in part and dissenting in part.

The majority and dissenting opinions agree that our endeavor is to strike a balance between two crucial, but contending, values: a public employee's constitutional rights of free speech and

association, and this Court's power to regulate the speech and conduct of employees associated with the judiciary. In striking that balance, the two opinions reach contradictory conclusions. The majority would not permit Mrs. Randolph to engage in any of her requested activities, but the dissent would permit her to engage in all of them.

In reaching opposite results, both the majority and the dissent draw upon the balancing test announced in Pickering v. Board of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and refined in Connick v. Meyers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). I agree that the appropriate standard is the Pickering balancing test, but for me the proper balance rests between the polar positions of the majority and dissenting opinions.

Basically, I agree with the majority's formulation that the Court should recognize the difference between a judicial employee who is intimately involved in decision-making, such as a judge or a law clerk, and a court aide, such as Mrs. Randolph, who is not close to that process. Ante at 446. That difference becomes the mainstay of the dissent, which vigorously contends that a court aide "is not at all like a judge***." Post at 468.

Although court aides are employed by the county sheriff, they work in and around the courtroom. Through the discharge of their duties, court aides create the appearance that they are part of the judge's official family, an appearance that could lead a member of the public, such as a litigant, a witness, or a juror to conclude that the aides are involved in the decision-making process.

Thus, we must be concerned with apparent, as well as actual, improprieties. To this extent, I disagree with the dissent, which suggests that a court aide's activities could never affect the public impression of judicial independence and impartiality. Post at 470.

A proper balance of interests should take into account that partisan political conduct poses more of a danger to judicial independence than does non-partisan activity. Even non-partisan political conduct, however, can threaten that independence. Moreover, the closer any public office held by a court aide is to the inner-workings of government, the greater is the threat to the independence of the judiciary. As the majority recognizes, "[a]ppointment to any public office poses a greater likelihood of impermissible judicial involvement in

other levels of government and the political process." Ante at 446.

Accordingly, I agree with the majority that Mrs. Randolph ought not serve on public bodies such as the Monmouth County Mental Health Board, the Freehold Borough Municipal Youth Guidance Council, the Freehold Borough Citizens' Participation Committee for HUD, or the Freehold Borough Board of Assessment. As the Administrative Office of the Courts advised Mrs. Randolph, "they are committees of other branches of government and they also involve a significant likelihood of involvement in political activity."

I would, however, permit her to continue to serve on the Executive Committee of the Red Bank Chapter of the National Association for the Advancement of Colored People (NAACP) and as second vice-president of the United Progressive

Homeowners & Taxpayers Association, Inc. (Homeowners Association). In my judgment, her service on the executive committee of a local chapter of the NAACP does not "pose a realistic likelihood of compromising the independence of the judiciary." Ante at 447.

Her activities on behalf of the Homeowners Association present a closer case. She is the agent for the service of process on the Association and serves as the Association's spokesperson. Also, she participated in the early plans for leasing a school building to be used for a pre-school program, and she accompanied the Association's president when they met with a county official concerning the details for the lease. As troublesome as these activities may be, I find that they do not pose a realistic likelihood of compromising judicial independence.

If she should escalate her activities in the private organizations to the point where those activities constitute such a threat, the Court may properly ask her to choose between continued employment and the private organizations. The dissent recognizes as much. Post at 467. Until then, I would not trench upon Mrs. Randolph's constitutional freedoms of speech and association by requiring her to resign as an officer of two private organizations.

GARIBALDI, J., dissenting.

Today, the majority holds that Norma Randolph, a $7,000-a-year court aide who is an employee of the Sheriff's Office, is prohibited by Rule 1:17-1 from exercising her First Amendment rights of freedom of speech and association because her activities in certain organizations constitute a threat to the impartiality

and independence of the judiciary. As a matter of both constitutional law and public policy, I would allow Mrs. Randolph to serve as well as to speak. Accordingly, I dissent.

I

The constitutional basis for my position is found in the fundamental liberties protected by the First and Fourteenth Amendments of the Federal Constitution and Article 1, paragraphs 6 and 18 of the New Jersey Constitution (1947).

The First Amendment "was fashioned to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Furthermore,

> [i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.
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> [NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1498 (1958).]

Similarly, Article 1, paragraphs 6 and 18 of the New Jersey Constitution

> not only affirmatively guarantee[] to individuals the rights of speech and assembly, but also expressly prohibit [] government itself, in a manner analogous to the federal First and Fourteenth Amendments, from unlawfully restraining or abridging "the liberty of speech."
>
> [State v. Schmid, 84 N.J. 535, 560 (1980).]

In Schmid, moreover, we concluded that the State Constitution "serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expres-

sional and associational rights of individuals...." Id. at 560.

In NAACP v. Alabama, the Supreme Court recognized that "[i]n the domain of these indispensable liberties, whether of speech, press, or association," abridgement even though unintended "may inevitably follow from varied forms of governmental action." 357 U.S. at 460, 78 S.Ct. at 1170, 2 L.Ed.2d at 1499.

Although the prohibition on encroachment of First Amendment liberties is not absolute, the Supreme Court has held:

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny...Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.
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> [Elrod v. Burns, 427 U.S. 347, 362, 96 S.Ct. 2673, 2684, 49

L.Ed.2d 547, 559 (1976) (citations omitted).]

This Court likewise has held that restrictions on rights of speech and association are subject to strict judicial scrutiny. In In re Hinds, we held that such limitations must "further an important or substantial governmental interest unrelated to the suppression of expression," and "be no greater than is necessary or essential to the protection of the particular governmental interest involved." 90 N.J. 604, 614 (1982). See In re Rachmiel, 90 N.J. 646, 655 (1982).

Nor may an individual, by virtue of being a public employee, be deprived of his or her constitutional right to freedom of expression and association. Connick v. Myers, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed. 2d 708, 716-17 (1983); Branti v. Finkel, 445 U.S. 507, 100 S.Ct.

1287, 63 L.Ed.2d 574 (1980); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Pickering v. Board of Educ., 391 U.S. 563, 88 S.Ct. 1731, 811 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Long gone are the days when the Supreme Court held that government could condition public employment on the surrender of certain constitutional rights. See Adler v. Board of Educ. 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952); Garner v. Los Angeles Board of Pub. Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); United Pub. Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930); "Developments in the Law - Public

Employment," 97 Harv.L.Rev. 1611, 1739 (1984).

The Supreme Court, however, recognizes that the state has a legitimate interest as an employer in regulating the speech and acts of its employees. Accordingly, in Pickering v. Board of Educ., 391 U.S. at 568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817, it established a balancing test to determine whether in furthering that interest a public employer has violated its employees' First-Amendment rights. The court must balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id.[1]

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[1]The Supreme Court's 5-4 decision in (footnote continued)

II

In applying the Pickering framework, one first must analyze the interests of the employee, as a citizen, in commenting upon matters of public concern. This requires consideration of the nature of the activity prohibited by the rule. "The more the subject matter of the employee's expression implicates core first amendment values, the greater is the government's burden in justifying its regulation." Note, "Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection," 85 Col.L.Rev. 558, 571 (1985).

(footnote continued from previous page) Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), limited the scope of public employees' expressional rights to those that address a public concern. Here, the majority agrees that the rights asserted by Norma Randolph are of public concern. Hence, the limitation imposed on the Pickering doctrine by Connick is not applicable here.

It is undisputed that Norma Randolph's rights to free speech and association are core First Amendment rights. Here "we are not quibbling over fine-tuning of prophylactic limitations but are concerned about the wholesale restriction of clearly protected conduct." FEC v. National Conservative PAC, 470 U.S. _____, _____, 105 S.Ct. 1459, 1471, 84 L.Ed.2d 455, 472 (1985).

Mrs. Randolph's activities fall into two categories: (1) public appointee positions on various community boards and councils, and (2) offices in two non-profit private community organizations. Specifically, the public positions concern the Monmouth County Mental Health Board (of which Mrs. Randolph is no longer a member), the Freehold Borough Board of Assessment, the Borough of Freedom [sic]

Youth Guidance Council, and the Citizens Participation Group of Freehold Borough. Additionally, Mrs. Randolph serves on the Executive Committee of the Greater Red Bank Chapter of the National Association for the Advancement of Colored People (NAACP), and is second vice-president of the United Progressive Homeowners and Taxpayers Association, Inc. (UPH).

The Court does not distinguish between Mrs. Randolph's activities in the public and private organizations, but prohibits her activities in all of the organizations for the same reason - namely, that these activities pose a realistic likelihood of involving the judicial employee in important and recurring public issues that are the frequent subject of political controversy, giving the impression of judicial involvement in those is-

sues and creating the appearance of a judiciary lacking in impartiality and independence. The majority concludes that the speech and association of judicial employees may be restricted if there is a realistic likelihood of interference with or disruption of the administration of the court's services, and finds that Mrs. Randolph's activities constitute a realistic likelihood of such a disruptive effect upon the work of the judiciary.

It is important to understand what this case does not concern. It does not concern traditional political activity. Not one of the organizations works for or advises political candidates or is involved in partisan politics.[2] Here the

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[2]Two leading cases in which the Supreme Court has addressed the constitutionality of statutes restricting the political activity of public employees are Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, (footnote continued)

majority does not limit Mrs. Randolph's activities because the organizations actually engage in "political activity," but rather prohibits her from serving in

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(footnote continued from previous page) 37 L.Ed.2d 830, and United States Civil Serv. Comm. v. National Ass'n of Letters Carriers, 413 U.S. 548, 93 S.Ct.2880, 37 L.Ed.2d 796 (1973). Although the Court upheld the challenged statute in each instance, it is clear from these decisions that the government's ability to restrict the political activities of its employees is extremely limited. As noted by the Third Circuit:

> We think *** that "Broadrick and Letter Carriers, properly viewed, carve out carefully circumscribed exceptions to the sweeping injunction of the First Amendment, exceptions allowing a legislature - Congress or state lawmakers - to inhibit only "partisan political activity" and not all political "discussion."
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> [Alderman v. Philadelphia Housing Auth., 496 F.2d 164, 172 (3rd Cir. 1974) (emphasis in original).]

While the present case does not concern a public employee's right to participate in either partisan or nonpartisan elections, (footnote continued)

civic and community organizations that have a potential to be involved in public controversy. This sort of speculation amounts to an outright prohibition of services in any civic or community organization,[3] since by definition such an organi-

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(footnote continued from previous page) these precedents demonstrate how narrowly the Supreme Court construes the government's ability to prohibit its employees from engaging in traditional "political activity."

[3]Such speculation also results in an uneven application of the Rule. In the past employees of the Administrative Office of the Courts and supporting judicial personnel have been permitted to serve on the New Jersey Advisory Commission for the U.S. Commission on Civil Rights; on the board of directors for the New Jersey Association for Retarded Citizens; as second vice-president for the Tenby Chase Civic Association, a local homeowners organization; on the executive committee of the Educational Rights Association; as a trustee of the Bergen Community Regional Blood Center; as a member of Citizens' Advisory Commission at Mercer County Community College; and as a trustee of Rutgers University. Permission was denied to serve on the board of directors of the (footnote continued)

zation deals with issues of public concern. In short, if all issues of public concern are classified as "political activity," then no civic involvement is permitted.

And so, this interpretation effectively precludes any employee covered by Rule 1:17-1 from actively participating in any community or civic organization. Indeed, under a literal application of the majority's test, a judicial employee, regardless of his or her position, could not serve as an officer in a religious organization, a parents'-teachers' association, or neighborhood environmental group. After all, there is a realistic likelihood

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(footnote continued from previous page) Trenton Chapter of the Urban League; as chairman of the board of trustees, Gloucester County College; on the board of directors of Jewish Hospital and Rehabilitation Center; and as alternate member of the Elizabeth Fair Rental Housing Board.

that activities in any of those organizations will involve the judicial employee in important and recurring public issues that are the frequent subject of public controversy. Moreover, although the majority seemingly holds that Mrs. Randolph may continue as a member of the NAACP and UPH, the reasons for prohibiting her from serving as an officer of the organization are equally applicable to preventing her from being an active member of the organization. Given Mrs. Randolph's 30 years of exemplary community service, it is unlikely that, unrestrained, she would ever be a passive member of any organization to which she belongs.

The Court also fails to recognize that while Rule 1:17-1 imposes an absolute ban on an employee engaging in "political activity," it does not impose

an absolute ban on an employee serving in an appointive position; instead it vests this Court with discretion to grant or deny permission to an employee to hold any other public office, position or employment. The majority claims that "[r]ealistically, such appointments come about through policies in the broader sense." Ante at 445. Ergo, any judicial employee is automatically prohibited from serving on such a governmental board or commission. But this Court's discretionary authority itself belies the majority's position. There may be cases where regular consistent activities in traditional politics leading up to the appointment may result in this Court's denying permission for a judicial employee to serve on a governmental board. The record in this case discloses no evidence of this type.

There is no suggestion that Mrs. Randolph ever engaged in any partisan political activities, let alone that such activities resulted in her appointments to the governmental boards. For all the Court's avowals of "realism," it overlooks the overriding reality to which the record points: that Mrs. Randolph's appointments to four governmental boards were not at all akin to the political plums of patronage that would compromise the integrity of the judicial system. Rather, the appointments are those positions usually given to concerned citizens of a community interested in helping all the citizens, but particularly the mentally ill, the young, and the disadvantaged.

The majority's interpretation not only violates an employee's First Amendment rights of freedom of association

and speech; it also is an unwarranted extension of the original meaning of the Rule. The source rule from which Rule 1:17-1 has evolved is R.R. 1:25C, which had been adopted in 1961. When the present Rule was adopted in 1969, the prohibition in the previous rule against "partisan political activity" was amended to prohibit "political activity." The purpose of the change was explained by its drafters in the "Comments on Rule 1:17-1" as follows:

> The introductory sentence of this rule substitutes the phrase "political activity" for "partisan political activity" in the source rule. The word "partisan" has been dropped since the Supreme Court has interpreted the present rule as barring those persons covered thereby from being active in non-partisan political elections.

Although I believe that the change was intended merely to clarify that the Rule

applied to all types of elections, whether partisan or nonpartisan, I recognize that under Rule 1:17-1 the term "political activity" may encompass more than traditional electoral political activity. In certain instances, depending on a court employee's position in the judiciary, his or her leadership role in a community activity may be so controversial and so antithetical to the independence and integrity of the judiciary that the employee should be forbidden to continue that role or even participation in any capacity. However, such a conclusion should be reached only after a thorough and vigorous analysis of the employee's activity, his or her position in the judiciary, and the impact of the challenged actions on the judiciary. Otherwise, we merely pay lip service to the Pickering

analytical framework, too readily allowing the State's admittedly real but unfocused interest in averting threats to the independence and impartiality of the judiciary to outweigh the citizen's core First Amendment rights.

III

On the other side of the Pickering balance, one must analyze the interest of the State as an employer that is invoked to justify the restriction upon the citizen-employee's rights of speech and association, along with the fit between this end and the means chosen to further it. Here I do not find that the prohibition of Mrs. Randolph's activities is necessary or essential to further any important or substantial governmental interest.

To be sure, the judiciary has an interest in maintaining its independence and impartiality. We have held that judges and others officially associated with the court system must be divorced from involvement in the political sphere, "as a necessary sacrifice for the sake of judicial integrity and the public appearance thereof." In re Gaulkin, 69 N.J. 185, 189 (1976).

> This separation is thought in this State * * * to be indispensable to public confidence in the courts and their probity, impartiality, disinterested objectivity and freedom from outside pressures in their dealing with causes coming before them. Such public confidence in judicial integrity is the foundation * * * of our courts' power, influence and acceptance as necessary instruments in the effective administration of justice. [Id.]

Nevertheless, our interest in preserving the integrity of the judicial

system must be balanced against a public employee's right to exercise his or her First Amendment rights. Any restriction imposed may not be greater than that which is necessary or essential to protect the governmental interest. Thus, in In re Gaulkin, we held that, subject to certain limitations, the prohibition against political activity on the part of a judge should not extend to his or her nonjudicial spouse. "Where a court is dealing with a First Amendment right (here the political involvement of the non-judicial spouse), fears that its exercise will have undesirable consequences cannot inhibit judicial vindication thereof." Id. at 198.

I acknowledge that some restrictions upon the political activities of an employee may further an important

governmental interest. However, there is no valid justification for an absolute prohibition upon the civic and community activities of court employees, particularly those who are as far removed from the judicial decision-making process as is Mrs. Randolph. The impact on the independence of the judiciary by the activities of a judge who exercises discretionary powers is radically different from the impact by the activities of an employee who performs ministerial tasks. In applying the balancing test, the majority ignores this difference. One reading the opinion of the Court might infer that Mrs. Randolph's duties are similar to those of a judge.

But Mrs. Randolph is not at all like a judge; she is a court aide, employed by the Sheriff's Office of Monmouth

County at a salary of $7,000.[4] She wears a uniform that identifies her as courtroom personnel. Her duties include the following: swearing in witnesses, taking juries

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[4]Mrs. Randolph also argues that as an employee of the Sheriff's Department, she falls within the category of persons exempted from Rule 1:17 under Rule 1:17-2, which provides:

> Rule 1:17-1 shall not apply to county clerks, county prosecutors, sheriffs nor to employees of their respective offices except as such employees are specifically referred to therein and except as otherwise provided by N.J.S. 2A:158-21 (proscribed political activity of county prosecutors and their staffs). [emphasis added.]

Mrs. Randolph argues that if we held in Clark v. DeFino, 80 N.J. 539 (1979), that Rule 1:17-1(a) and (b) were insufficient to overcome the exemption as to surrogates, it should follow that the general language of Rule 1:17-1(f) is insufficient to overcome the exemption as to sheriff's employees. Thus, Rule 1:17-1 is inapplicable. I disagree with this contention and find that if a court aide has sufficient contact with the court system, he or she may be bound by Rule 1:17-1.

up and down stairs, preparing the courtroom with water pitchers and chairs, and occasionally announcing entrances and exits of the judge. She has never received a direct order from a judge. She takes her orders from a co-worker, a more experienced employee of the Sheriff's Department, who is a court attendant. Significantly, on the basis of a factual hearing below, the court found that Mrs. Randolph does not engage in any of the following duties:

> (i) attend the judge on the bench or in chambers, answer the telephone, obtain law books, procure documents or records;
>
> (ii) see that counsel, court clerk, court reporter other necessary personnel are present before the judge leaves his chambers;
>
> (iii) call trial lists, announce postponements or adjournments; or

(iv) supply information personally or by telephone to attorneys, prosecutor, sheriff, or other county officials as to trial, motion, dismissal lists, adjournments, current status or disposition of cases.

A review of Mrs. Randolph's duties indicates that, unlike a judge's secretary or law clerk, she has neither close contact nor a close personal relationship with the judge. Court aides are not considered personal aides to judges, and judges are discouraged from treating court aides as such. They are uniformed personnel assigned by the sheriff to various courtrooms, not to a particular judge. They perform important, necessary ministerial functions, but they are not involved in the decision-making process of the court.

This analysis of the position of the judicial employees is not meant to demean or denigrate the job of any judicial employee, but rather to point out that certain positions are more central and sensitive to the decision-making process of the judiciary than others. The functions of Mrs. Randolph and the function of a judge with respect to their impact on the independence and impartiality of the judiciary and the public's perception of their impact are totally different.

While those in a position to affect decision-making or to influence the public's confidence in the judiciary must maintain their independence and impartiality, restraints upon the civic and community activities of court employees who are so far removed from the judicial decision-making process as Norma Randolph

are not warranted. Prohibiting Mrs. Randolph from serving in either the public or private organizations with which she is affiliated goes far beyond protecting the integrity of the judiciary. The majority has realistically imposed on Mrs. Randolph requirements that should be reserved for judges and other people who are in a position to influence judges or the administration of justice. I simply do not believe the public perceives that court aides who are assigned randomly to courtrooms to perform administrative tasks influence the legal decisions of the judges who sit within them.

Certainly, it is less troublesome for the court to issue as it does today an absolute prohibition on its employees and other judiciary support personnel from actively participating in any

organization that is concerned with public issues. However, the First Amendment does not permit such a blanket prohibition. Any restrictions must be based upon realistic appraisals of substantial harm to the government. Such appraisals have not been made here. The majority's opinion makes only vague references to the harm that will be done to the judiciary by Mrs. Randolph's participation in these activities:

> We do not believe that we must prove beyond debate that this detachment is necessarily lost, or that litigants will start to think that a judge will be partial to a particular group or philosophy because of association with politically-active court personnel. More is at stake here than proof or prejudice. We think that there is a much more subtle value involved, and do not think the Constitution prevents us from promoting such values, even if they are difficult to describe or prove, so long as they represent something very important. There is a tone, a

> feeling, an atmosphere, of impartiality that should surround everything that has to do with the judiciary. That subtle value is destroyed or damaged each time that someone connected with the courts does something that judges should not do even though they are not judges. [Ante at 452, 453].

The majority does not apply the Pickering balancing test in a reasonable, common-sense manner. In actuality, the interest of the judiciary here is slight when weighed against Mrs. Randolph's protected forms of expression.

Although the majority claims to eschew an absolutist approach (either on the side of protecting expression and association or restricting it) for a balancing approach, it invokes Chief Justice Weintraub for the proposition that "[t]he prohibition on political activity is absolute", ante at 441, and that "[t]he relevant factor is ... she has been

assigned by the Sheriff to the courtroom."[5] ante at 452. Furthermore, the majority claims to have distilled from various decisions and principles "a flex-

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[5]The Court takes issue with my suggestion that it adopts an absolutist approach instead of applying the Pickering balancing framework, apparently qualifying its otherwise practically absolutist approach with the concession that "[i]f there is a role as officer in the private organizations that petitioner can fulfill, not as advocate, leader, or spokesperson in the public forum, we will sympathetically evaluate the request." Ante at 454. This is no concession at all, for it does not necessarily manifest a balancing approach. Any "absolutist" approach will admit of exceptions, if only in the sense of requiring judgments in defining the range of absoluteness--here, for example, in determining the boundary between "private organization" and "public forum." And, given the majority's analysis throughout the rest of the opinion, it is hard to imagine what role as officer in such "private" civic and community organizations would survive its supposedly sympathetic evaluation--unless, ironically, that role were to discharge the very sort of duties Mrs. Randolph performs as court officer.

A final point should be noted. Pace the Court's suggestion, this case

(footnote continued)

ible rule that is tailored to the relationship or proximity of the employee to the decision-making and to the nature and extent of the political activities sought to be engaged in by the employee." Ante at 441. With all due respect, I submit that the Court inflexibly applies an absolute rule, failing to tailor it to the first of these two enunciated factors.

(footnote continued from previous page) "comes to us as a direct challenge to the application of our rule to a court attendant with the defined outside activities." Ante at 454. On June 16, 1983, this Court ordered that the petition for review in this case be granted and that the matter be temporarily remanded to the Assignment Judge of Monmouth County to designate a judge to conduct a hearing and ordered that the judge make recommended findings of fact on the nature of the organizations involved, the activities and relationship of Norma Randolph with those organizations and the duties and activities of Norma Randolph as a court aide. The hearing was held on October 21, 1983 before a judge of the Superior Court of Monmouth County, who made the recommended findings of fact, which along with facts added by Petitioner form the record in this case.

A court attendant like Mrs. Randolph, conceding her association with organizations concerned with public issues that are likely to be the subject of judicial resolution, nonetheless is not close enough or so related to a judge as to give the appearance of a judiciary lacking in impartiality on these issues. The "appearance of impropriety," while real and subtle, threatens to become an insubstantial and fanciful specter in the majority's analysis. And so, the majority, in being "unique[ly] committed" to the actual and apparent independence of court employees, is less protective of their constitutional rights to expression and association than is the balancing framework of Pickering and Connick. It lays aside our State's proud tradition of "exceptional vitality in the New Jersey

Constitution" with respect to these constitutional rights, indeed of being more protective of such rights than is the United States Constitution. State v. Schmid, 84 N.J. at 557. The Court's bright line approach obscures its encroachment upon constitutional rights to freedom of expression and association.

IV

Furthermore, the majority did not consider the least intrusive means to achieve the intent of Rule 1:17-1. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S.

415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, 418 (1963).

> "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." [Elrod v. Burns, 427 U.S. 347, 363, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547, 559 (1976) (citations omitted).]

The restrictions imposed on the clerks of the federal courts, who have a closer relationship with the judges of those courts than does Mrs. Randolph with state court judges, offer a telling contrast. Canons 5B and 7B of the Code of Conduct for United States Clerks provide as follows:

Canon 5B. Civil and Charitable Activities. A clerk may participate in civic and charitable activities that do not detract from the dignity of his office or interfere with the performance of his official duties. A clerk may serve as an officer, director, trustee or advisor of a civic or charitable organization and solicit funds for any such organization, subject to the following limitations:

(1) He should not use or permit the use of the prestige of his office in the solicitation of funds.

(2) He should not solicit his subordinates to contribute to or participate in any civic or charitable activity, but he may call his subordinates' attention to a general fund-raising campaign such as the Combined Federal Campaign or the United Way.

(3) He should not solicit funds from lawyers or persons likely to come before him or the court which he serves.

Canon 7B. Nonpartisan Political Activity. A clerk may engage in nonpartisan political activity that does not tend to reflect adversely on the dignity of the court or his office, or interfere with the proper performance of

his official duties. [Vol. 1-C Guide to Judiciary Policies and Procedures, Ch. X Personnel Regulations, Part J Code of Conduct for United States Clerks (March 14, 1979)[6].]

A reading of these federal guidelines suggests that the Court could resort to other less restrictive measures to effectuate the primary aim of protecting the integrity and independence of the judicial system.

Rather than resort to the imposition of a blanket ban against community and civic involvement, another less drastic means would be for the Court to adopt in fact as well as in name the Pickering approach, directing that actual or perceived conflicts be resolved as they

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[6]On April 28, 1983, Canon 5B was amended as follows: "a civic or charitable organization" was changed to "an educational, religious, charitable, fraternal, or civic organization." On May 19, 1983, the Code was amended in other respects.

arise. For example, while it is possible, although highly unlikely, that any one of these organizations may become involved in litigation and be assigned to the same court to which Norma Randolph is also assigned, it would be a simple administrative matter to have her temporarily reassigned to a different courtroom. If a serious conflict arose, the Court could at that time balance the purposes and policies to be served by a proscription against Mrs. Randolph's continued involvement in the organization. Measures like these would be adequate to protect the public's confidence in the judiciary, while preserving Mrs. Randolph's fundamental First Amendment rights.

"It goes without saying that our system of government is predicated upon the premises that every citizen shall have the right to engage in political activity. It is a basic freedom enshrined in the First Amendment." In re Gaulkin, 69 N.J. at 191. This important right must be relinquished by our judges upon ascendancy to the bench. Id. However, no justification exists for adherence to a prophylactic policy so fixed as to preclude Norma Randolph, an outstanding citizen devoted to serving her community, from exercising her right to participate in her community's activities as she has done in the past. Certainly, a mere allegation that an organization committed to benefitting the community may have a potential for public controversy is not a

sufficient basis on which to curtail Mrs. Randolph's First Amendment rights. Under the Pickering balance test, the judiciary's interest in Mrs. Randolph's right to engage in activities that do not constitute traditional electoral political activity is minimal. In contrast, Mrs. Randolph's rights are fundamental and compel this Court's vigilant protection. The judiciary's interest is adequately protected by judging the restrictions on civic participation according to an employee's duties in the court system.

No. 85-1631

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NORMA RANDOLPH,

Petitioner,

vs.

SUPREME COURT OF NEW JERSEY and
WILLIAM M. LANZARO, Monmouth County Sheriff,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Counter-Statement of the Case 1

Summary of Argument 9

Argument:

The Writ should be denied as the decision of the New Jersey Supreme Court is fully consistent with this Court's decisions involving the First Amendment rights of public employees.... 10

Conclusion 19

PAGE

Table of Authorities

Cases Cited

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 14, 18

Connealy v. Walsh, 412 F. Supp. 146 (W.D. Mo. 1976) 16

Connick v. Myers, 461 U.S. 138 (1983) 11, 12

FEC v. National Right to Work Committee, 459 U.S. 197 (1982) 11

Gaulkin, In re, 69 N.J. 185, 351 A.2d 740 (1976)..... 12

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) 11

Konigsberg v. State Bar of California, 366 U.S. 36 (1961) 11

Morial v. Judiciary Com'n of Stat of La., 565 F. 2d 295 (5th Cir. 1977) 15

Norma Randolph, IMO, 101 N.J. 425 (1986)..... 12, 13,16

Pickering v. Board of Educ., 391 U.S. 563 (1968) 8-10, 12, 13

Prohibition of Political Activites by Court-Appointed Employees, In re, 473 Pa. 554, 375 A.2d 1257 (1977) 16

Rowland v. Mad River Local School Dist., U.S. , 105 S. Ct. 1373 (1985) 12

Smith v. Ehrlich, 430 F. Supp. 818 (D. D.C. 1976)14, 15

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 14-17

United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973)11, 14, 16, 18

PAGE

United States Constitution Cited

First Admendment 9, 10, 15

Statute Cited

5 U.S.C. §7324 et seq. (HATCH ACT) 14

Cannon Cited

Code of Conduct for United States Clerks:

Cannons 5B and 7B 17

Rule Cited

R. 1:17-1 ..... 2, 7, 8, 18, 19

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Counter-Statement of the Case

In recognition of "New Jersey's unique commitment to an independent judiciary" and to avoid "the appearance of a judiciary lacking in impartiality," the Supreme Court of New Jersey adopted a court rule in 1961 which banned

partisan political activity by court employees and required the employees to request the Court's prior approval before holding any other public office (Pa16, Pa37 to Pa38, Pa32).* Following a series of decisions by the Court interpreting the rule's restrictions as applicable to non-partisan political activity, the rule was amended in 1969 to substantially its present form (Pa32 to Pa33). Since 1969, R. 1:17-1 of the Rules Governing the Courts of the State of New Jersey has "specifically prohibited any form of political activity by court officials" (Pa34).

Petitioner Norma Randolph was hired as a court attendant by respondent William M. Lanzaro, Sheriff of Monmouth County, on January 13, 1983 (Pa3 to Pa4). A court attendant "is a uniformed employee who attends the judges of one or more of the courts located in the . . . county court house" and whose "duties include the supervision of the activities of parties, jurors, and witnesses in the courtroom; the work of court crier; swearing in witnesses; sequestering jurors; and in general the performance of nonsecurity tasks related to the conduct of courtroom business" (Pa4). As an employee of the judicial branch of government subject to the provisions of R. 1:17-1, Mrs. Randolph submitted a list of her outside activities to the Monmouth County trial administrator for review (Pa4). Following that review, the Administrative Office of the Courts advised petitioner that, pursuant to R. 1:17-1, she could not continue to serve as an appointed member of four public boards and committees while employed by the judiciary "primarily because they are committees of other branches of government, and also they involve a significant likelihood of involvement in political activity" (Pa4 to Pa5). Mrs. Randolph was also advised that she could not

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* Pa refers to petitioner's appendix.

continue as an officer of two private associations while employed by the judiciary since "these activities also hold a substantial potential for political activity" (Pa5).

Following receipt of the advice from the Administrative Office of the Courts, the Assignment Judge of Monmouth County entered an order for compliance on May 6, 1983 which required the Sheriff of Monmouth County to reassign Mrs. Randolph from courtroom duties should she continue to be engaged in the outside activities (Pa4 to Pa5). Respondent Sheriff of Monmouth County thereafter filed a notice of petition for review with the Supreme Court of New Jersey on May 30, 1983 (Pa5). The Court granted the petition on June 16, 1983 and ordered that a factual hearing be held concerning the activities of Mrs. Randolph (Pa6). The hearing was held on October 21, 1983 before a judge of the Superior Court of Monmouth County who subsequently submitted recommended findings of fact (Pa6). Petitioner did not take exception to any of the recommended findings (Pa6). Following submission of briefs on behalf of petitioner, respondent Lanzaro, the Judiciary and *amicus curiae* NAACP, oral argument was held before the Court on September 10, 1984 (Pa1).

On January 7, 1986, the Supreme Court of New Jersey rendered its decision affirming the Compliance Order of the Law Division, thereby denying the request of Mrs. Randolph to continue her outside activities while serving as a court attendent (Pa1, Pa72). In rendering its decision, the Court carefully examined the nature of the organizations involved as set forth in the recommended findings of the lower court (Pa50).

According to those findings, the public organizations to which Mrs. Randolph has been appointed by either municipal or county elected officials are the Monmouth

County Mental Health Board, the Freehold Borough Board of Assessment, the Freehold Borough Youth Guidance Council and the Freehold Borough Citizens Participation Group HUD (Pa38). "Each [organization] plays a role designated by statute, regulation, or ordinance in government and public affairs" (Pa38 to Pa39). For example, the Monmouth County Mental Health Board is an agency of county government with the responsibility for, *inter alia*, developing a comprehensive plan of community mental health services and recommending the amount of state financial aid to be allocated to each such project in the county (Pa39). Additionally, the Board takes positions on "legislation that involves the funding for mental health projects" (Pa39). The function of the Freehold Borough Board of Assessment "is to make assessments of benefits accruing from local improvements in the Borough" (Pa40). Its statutory responsibility is "to examine real estate in the vicinity of a local improvement to determine what lands have been benefited and also to fix and determine the amount of damages accruing to any property by reason of construction of municipal facilities" (Pa40).

Since federal regulations governing community development block grants mandate citizen participation, the Citizens Participation Group of the Freehold Borough HUD was established pursuant to these regulations with the responsibility "to hold public hearings and determine the establishment of priorities for the expenditure of funds allocated to the communities in connection with the community block grant program" (Pa40 to Pa41). The fourth public appointive position held by Mrs. Randolph is with the Freehold Borough Youth Guidance Council, which is a statutorily created public body serving "as an alternative to judicial enforcement in juvenile complaints" (Pa41,

Pa43). Police officers, instead of signing juvenile complaints, may refer them to the Youth Guidance Council which is authorized to make recommendations for corrective action (Pa 41 to Pa42).

None of the organizations described above endorses political candidates or are involved in partisan politics (Pa42). However, based on their nature and duties, the majority decision of the New Jersey Supreme Court concluded that

> the first three of [the organizations] are deeply involved in the political activity of the community. The determination of which section of the community shall receive community development block grant programs can be a highly charged political decision. Such a decision has a realistic likelihood of involvement in litigation if dissatisfied citizens protest the action of the governing body in adopting its plan for participation in the community development block-grant program. Few subjects are more controversial than a public improvement. The citizen whose lands have been the subject of a road improvement or a sewer assessment finds himself or herself deeply embroiled in a community dispute about the wisdom or necessity of the improvement. An equally realistic likelihood for public controversy arises with respect to the determination of funds and sites for community mental health programs [Pa42 to Pa43].

As to the Youth Guidance Council, the majority decision concluded that those "who have been subjected to its process and who later appear in Court might understandably feel that their position was somewhat compromised

by their prior involvement with the court employee in the employee's municipal capacity" (Pa43). Neither the concurring nor the dissenting opinions disagreed with the factual conclusions concerning the nature of the activities engaged in by these public bodies (See Pa82; Pa116).

In addition to these four public organizations, Mrs. Randolph is a member and serves on the Executive Committee of the Greater Red Bank Chapter of the National Association for the Advancement of Colored People (Pa47, Pa82). Findings concerning the activities of the Greater Red Bank NAACP demonstrate that while the organization does not support or oppose specific canadates, the local branch does host an annual "Candidate Night" and is actively involved in voter registration efforts and in transporting voters to the polls (A55). Moreover, the record reflects that the local chapter had recently "been actively involved in public positions with respect to the discriminatory effect of various public issues" (A56). Additionally, the majority opinion took judicial notice of the purposes and goals of the NAACP, "knowledge of [which] . . . is part of our national culture" (A52). Based on this knowledge and an examination of the local chapter's constitution and by-laws, the majority found that the members of the NAACP "seek, through cooperative organizational activity, to achieve the legitimate political goal of eliminating all racial barriers that deprive black citizens of the privileges and burdens of equal citizenship rights in the United States" (P52 to Pa54). In accomplishing this goal "the organization would be unfaithful to its purposes if it did not seek to hurl itself into the center of the deeply divisive political controversies that surround the elimination of every trace of prejudice and bias in our society" (Pa53 to Pa54). Moreover, such controversies

often lead to litigation in the state court system (Pa56). Again, neither the concurring nor dissenting Justices disagreed with the majority's factual conclusions concerning the nature of the activities of the NAACP (See Pa82 to Pa83; Pa116).

Mrs. Randolph is also active in the United Progressive Homeowners and Taxpayers Association which was formed "as a direct outgrowth of the Citizens Participation Group of the Freehold Borough for HUD," one of the four public bodies to which Mrs. Randolph was appointed (Pa50). While this private organization is not affiliated with a political party and does not endorse political canidates, "it was involved directly in soliciting funds from the community to develop a county-owned building . . . as a community resourse facility" (Pa51). Mrs. Randolph negotiated directly with county officials in this regard, she is the agent for service of process on the association and she serves as its second vice-president and spokesperson (Pa51, Pa83).

Following this careful analysis of the nature of each of the six organizations involved, the Court concluded that approving Mrs. Randolph's request to continue serving on the four public bodies and in a public leadership role in the two private organizations would threaten the goal that Rule 1:17-1 seeks to accomplish. As the majority decision states:

> What litigants experience is the public face of justice. It is a face that includes much more than the judges; it includes everyone who works in that courtroom and everything that worker portrays to the public. The face that the public sees should have the appearance of total honesty and total imparti-

> ality. That imparitiality will be lost when the visible face of the judicial system, presented through its employees in a courtroom, portrays a commitment not only to one of the parties or issues involved in litigation before the court but to any partisan cause. To preserve that independence and impartiality for all, our employees must forego roles in the public political arena [Pa60].

The Court was careful to stress that the restrictions applied only to Mrs. Randolph's "public political activities" and not her membership in either the NAACP or the United Progressive Homeowner and Taxpayers Association (Pa 70).

In rendering its decision the Court addressed petitioner's challenge to Rule 1:17-1 and its application to her as impermissably restricting her First Amendment rights of freedom of expression and association and as being vague and overbroad (Pa1 to Pa15; Pa58 to Pa72). The decision emphasizes that "[p]ublic employees do not shed their constitutional rights when they undertake" public employment and thus "careful attention must be paid to Norma Randolph's petition to engage in the activities while she serves as a judicial employee" (Pa7 to Pa8). Applying the holding of the United States Supreme Court in *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968) "that government as an employer has interests 'in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general,'" the New Jersey Supreme Court concluded that a balancing process must be employed to reconcile the competing interests (Pa8 to Pa15) (quoting *Pickering* v. *Board of Educ., supra,* 391

U.S. to 568). The process requires the Court to "balance the substantial interest of the judiciary, the forms of expression involved, and the availability of other means to achieve the goals of the judiciary" (Pa15). When the particular activities at issue "pose a realistic likelihood of involving the employee in important and recurring public issues that are a frequent subject of political controversy, that create the appearance of judicial involvement in those issues, and that generally give the appearance of a judiciary lacking in impartiality on the issues involved" the interest of the Court in preserving "judicial integrity and the public appearance thereof" must prevail over an individual employee's rights (Pa37 to Pa38, Pa72).

Summary of Argument

The writ sought herein should be denied because petitioner has failed to demonstrate that the decision of the New Jersey Supreme Court conflicts with any principles enunciated by this Court in the area of the First Amendment rights of public employees. The New Jersey Supreme Court properly interpreted and applied the balancing process established in *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968) in deciding that petitioner's political activities may constitutionally be restricted while she is employed in the state judicial system. Contrary to petitioner's contentions, this Court's prior decisions permit restrictions on other than partisan political activity and such further restrictions as imposed by the New Jersey Supreme Court are reasonably necessary to achieve its goal of an independent and impartial court system. Moreover, pursuant to this Court's precedents, less restrictive means would not accomplish the goal of completely divorc-

ing the courts of New Jersey from political and outside pressures, both real and perceived. Since the decision below is consistent with rulings of this Court, no basis exists for granting review of the writ of certiorari.

ARGUMENT

The Writ should be denied as the decision of the New Jersey Supreme Court is fully consistent with this Court's decisions involving the First Amendment rights of public employees.

Both the majority and dissenting opinions of the New Jersey Supreme Court agree on the legal prinicples that govern the issues in this case. As Justice Pollock stated in his concurring and dissenting opinion "[t]he majority and dissenting opinions agree that our endeavor is to strike a balance between two crucial, but contending, values: a public employee's constitutional rights of free speech and association, and this Court's power to regulate the speech and conduct of employees associated with the judiciary" (Pa78 to Pa79). Neither is there disagreement in the opinions below concerning the factors that should be addressed in the balancing process pursuant to this Court's decision in *Pickering* v. *Board of Educ., supra* (compare Pa37 with Pa102). Rather, the difference in outcome between the majority and dissenting opinions is predicated on the dissent's factual conclusion that a court aide's role is not sufficiently "sensitive to the decision-making process" of the judiciary to warrant restrictions since the public would not "perceiv[e] that court aides who are assigned randomly to perform administrative tasks influence the legal decisions of the judges. . . ." (Pa105 to

Pa106, Pa110, Pa111). In contrast, the majority and concurring Justices concluded that the position which Mrs. Randolph holds in the judicial system "presents a close association with the judicial process. . . . [and] that her identification with the judge is sufficient to meet the criteria outlined for creating the appearance of judicial involvement in controversial political issues" (Pa64, see Pa81).

As discussed *infra* both the majority and dissenting opinions correctly interpreted the precedents of this Court concerning restrictions on the First Amendment rights of public employees. Thus, the only issue in dispute is whether the public so closely identifies a court attendant in the New Jersey judiciary system with the judge he or she serves such that restrictions on the political activities of court attendants are necessary in order to preserve the complete impartiality of the New Jersey court system. This factual issue alone, however, does not justify plenary review by this Court "in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

As recognized by the Supreme Court of New Jersey, there is no doubt that "[p]ublic employees do not shed their constitional rights when they undertake such service" (Pa7); see *Connick* v. *Myers*, 461 U.S. 138, 142 (1983). However, as this Court has consistently held "[n]either the right to associate nor the right to participate in political activities is absolute." *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 567 (1973); see also *FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982); *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961). It has long been established that the government has an interest in regulating the conduct and "the speech of its employees

that differ[s] significantly from those it possesses in connection with regulation of the citizenry in general." *Pickering* v. *Board of Education, supra,* 391 U.S. at 568.

In *Pickering,* this Court invoked a balancing test to judge the validity of restrictions on the First Amendment rights of public employees. Pursuant to that test the First Amendment rights asserted by the employee must be weighed against the disruptive effect of the activities on the government's ability to provide services. 391 U.S. at 568. The rationale of *Pickering* and *Connick* is to seek a balance "between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption." *Rowland* v. *Mad River Local School Dist.,* U.S. , 105 S. Ct. 1373, 1376 (1985) (Brennan, J., dissenting from denial of *certiorari* in Mem. No. 84-532). The decision of the Supreme Court of New Jersey in *IMO Norma Randolph,* 101 N.J. 425 (1986), reflects a careful and painstaking application of the balancing process established by this Court.

The interest of the state judiciary against which Mrs. Randolph's interests must be balanced reflects "New Jersey's unique commitment to an independent judiciary" (Pa16). It is a commitment "so austere" (Pa72) that not only judges but "others officially associated with that court system have been wholly divorced from involvement in partisan or other political activity, as a necessary sacrifice for the sake of judicial integrity and the public appearance thereof." *In re Gaulkin,* 69 N.J. 185, 189, 351 A.2d 740 (1976). "This separation is thought in this State . . . to be indispensable to public confidence in the courts and their probity, impartiality, disinterested objectivity and freedom from outside pressures in their dealing with causes coming before them." *Ibid.*

The Court in *Randolph* identified several factors to be carefully examined in determining whether the rights of judicial employees "can be reconciled with the public's need for confidence that the judiciary will be unquestionably impartial in resolving the disputes that necessarily arise in community life" (Pa8, Pa36 to Pa37). The factors to be "weigh[ed] in the balance" are "the substantial interest of the judiciary, the forms of expression involved, and the availability of other means to achieve the goals of the judiciary" (Pa15). The Court further reasoned that the balance of competing interests "is related to the closeness of the employee to the judicial decision-maker and the realistic likelihood that the activities will become the focus of public controversy" (Pa36 to Pa37). This formulation of the balancing process to be invoked is entirely consistent with this Court's decisions. In *Pickering* v. *Board of Educ., supra,* this Court expressly declined to state a "general standard" by which all conflicts could be judged "[b]ecause of the enormous variety of fact situations" which may arise and further noted "that significantly different considerations would be involved" in different factual patterns. 391 U.S. at 569, 570 n.3. The balancing process invoked by the New Jersey Supreme Court in this case takes into account all the considerations which should be examined. Indeed, petitioner does not really challenge the standards developed by the Court. Rather, she challenges the Court's definition of "political activity" and contends that this Court's precedents permit restrictions only on the partisan political activity of public employees. Petitioner's argument, however, misinterprets this Court's prior decisions.

In a series of three cases this Court has addressed First Amendment challenges to the validity of portions of the

"Hatch Act," 5 U.S.C. §7324 *et seq.*, which restricts federal employees' political activities, and to an Oklahoma statute which imposes similar restrictions on state employees. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973) [*Broadrick*]; *United States Civil Service Commission* v. *National Association of Letter Carriers* [*Letter Carriers*], 413 U.S. 548 (1973); *United Public Worker* v. *Mitchell,* [*Mitchell*], 330 U.S. 75 (1947). In all three cases the validity of the statutes was upheld. While it is true that this Court focused on the limitations to partisan political activity in the applicable statutes in rejecting the challenges, the cases do not hold that only restrictions on partisan activity are permissable. *Smith* v. *Ehrlich,* 430 F. Supp. 818, 820 (D. D.C. 1976). Rather, the holding in these cases that restrictions on partisan political activity comport with the First Amendment is explained by the fact that in all three cases the government had decided that restricting only those activities was sufficient to achieve its purposes of assuring that its laws would be administered "without bias or favortism for or against any political party or group," to prevent the expanding federal work force from becoming a "powerful, invincible, and perhaps corrupt political machine," *Letter Carriers, supra,* 413 U.S. at 565-566, and to "attrac[t] members of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from 'political extortion,' " *Broadrick, supra,* 413 U.S. at 606.

In light of the admittedly legitimate governmental interests sought to be protected by the Hatch Act and the Oklahoma statute, the focus in these cases was on whether the restriction furthered those interests. As the challenged statutes went no further, it was not necessary for this Court to determine whether any broader restrictions on

political activity would be justified under the First Amendment, given different governmental interests to be achieved. In fact, in *Mitchell* this Court expressly left open the question of how far Congress could go in regulating the political activities of federal employees when it noted that

> We do not know . . . whether the need for regulation of their political activities will increase or diminsh. The use of the constitutional power of regulation is for Congress, not for the courts.
>
> We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of government employees shall be regulated lies primarily with Congress [330 U.S. at 102].

Thus the standard established by *Mitchell* for determining the validity of prohibitions on public employees engaging in political activity is whether "the act regulated . . . [is] an act reasonably deemed by Congress to interfere with the efficiency of the public service." *Mitchell, supra,* 330 U.S. at 101. The correct inquiry in each case is not whether the prohibited activity is partisan or non partisan, election related or not, but whether there is "a reasonable necessity" for imposing the particular restriction in order to achieve a sufficiently important public objective. *Morial* v. *Judiciary Com'n of State of La.,* 565 F. 2d 295, 302 (5th Cir. 1977); *Smith* v. *Ehrlich, supra,* 430 F. Supp. at 821. As the decision of the New Jersey Supreme Court makes clear, restrictions on the type of

activities engaged in by petitioner are "reasonably necessary" to achieve the goal of a court system completely divorced from politics and outside pressures, both real and perceived, especially in light of the public tendency to attribute activities of court employees to judges. *Connealy* v. *Walsh*, 412 F. Supp. 146, 156 (W.D. Mo. 1976); *In re Prohibition of Political Activities by Court-Appointed Employees*, 473 Pa. 554, 375 A.2d 1257 (1977). As stated in *Letter Carriers*

> it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent [413 U.S. at 565].

Petitioner further challenges the decision of the New Jersey Supreme Court by arguing that there is no objective evidence that restrictions on her particular activities will promote the goal of an independent and impartial judiciary in the State of New Jersey. However, the decisions of this Court concerning the validity of restrictions on public employees' political activities have not required such objective proof. See *Mitchell, supra,* 330 U.S. at 97-98; *Letter Carriers, supra,* 413 U.S. at 556-557. Moreover, as the majority decision in *IMO Randolph* states

> This case cannot be decided as if petitioner were the only court aide in the system. We must ask ourselves how independent the stance of the judiciary remains when not one but many, or indeed all of the aides in a courthouse participate in political affairs or other activities that spill over into the political arena [Pa59 to Pa60].

Similarly, in *Mitchell* this Court upheld the "fear" of Congress concerning "the cumulative effect" of all employees "who could be induced to participate actively" as a constitutional basis for restrictive legislation. 330 *U.S.* at 101.

Petitioner also contends that the Supreme Court of New Jersey impermissably rejected "less restrictive means to the end of judicial independence" (Petition at page 15). It is suggested that the arguably less restrictive prohibitions contained in Cannons 5B and 7B of the Code of Conduct for United States Clerks would adequately achieve the goals of an independent and impartial New Jersey judicial system. Petitioner rejects without "comment" the reasoning of the New Jersey Court in concluding that adopting such lesser restrictions would not adequately achieve its goal (Petition at page 17). Rather than being "contrary to reality," that reasoning is entirely persuasive. The Justices of the Supreme Court of New Jersey are certainly knowledgeable of the differences between the state and federal court system. As noted in the decision, "the rules that we fashion [for the state system] must be relevant to a system formed upon the county court house and municipal court. In such a system, court personnel are the community members" (Pa61). The validity of this reasoning is demonstrated by the precise facts of the instant matter. Petitioner, who was employed in the Monmouth Couty Court House, located in Freehold, was appointed to public positions in Monmouth County and Freehold and active in private organizations concerned directly with issues arising in that county. In contrast, the federal district courts encompass many counties and controversies which are brought before them often arise in counties outside the location of the court itself (Pa60 to Pa61). In light of the differences between the two court systems, the New

Jersey Supreme Court correctly rejected the contention that less restrictive means are available to accomplish its goal.

Finally, in a footnote petitioner suggests that Rule 1:17-1 is unconstitutionally vague. To the extent that this contention has been adequately raised in the petition, it is clearly without merit. In rejecting a similar contention in *Letter Carriers,* this Court found it "important" that the public employees had access to a procedure whereby they could "obtain advice from the [Civil Service]Commission and thereby remove any doubt that there may be as to the meaning of the law." 413 *U.S.* at 580. Similarly, as this case and others cited in the Court's decision demonstrates, New Jersey court employees have access to a procedure whereby they may seek approval of the New Jersey Supreme Court to participate in activities which may or may not be deemed "political" (Pa32 to Pa37).

As stated by this Court in upholding restrictions on partisan political activity of federal employees, the restrictions of Rule 1:17-1

> are not aimed at particular parties, groups or points of view . . . They discriminate against no racial, ethnic or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls [*Letter Carriers, supra,* 413 *U.S.* at 564].

Rather, the rule "seeks to regulate political activity in an even-handed and neutral manner." *Broadrick, supra,* 413 U.S. at 616. The long recognized importance in New Jersey of a complete separation of its court system from political concerns and the reasonable necessity of prohibiting court employees from engaging in activities which may call into question the independence and impartiality

of the judiciary more than justify the "even-handed" infringement on the activities of court employees contained in Rule 1:17-1. In deciding that petitioner's activities may constitutionally be restricted after a balancing of the competing interests involved, the New Jersey Supreme Court has adhered to the principles enunciated by this Court. Since the legal conclusions of the decision below are wholly consistent with opinions of this Court, no basis exists for plenary review of this matter.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the petition for *certiorari* should be denied.

Respectfully submitted,

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